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THE

LAWS OF ENGLAND.

VOLUME XIV.

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THE

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BEING

A COMPLETE STATEMENT OF THE WHOLE LAW OF ENGLAND.

BY

THE RIGHT HONOURABLE THE

EARL OF HALSBURY

LORD HIGH CHANCELLOR OF GREAT BRITAIN,
1885-86, 1886-92, and 1895—1905,

AND OTHER LAWYERS.

VOLUME XIV.

EXECUTION.
EXECUTORS AND ADMINISTRATORS.
EXPLOSIVES.
EXTRADITION AND FUGITIVE OFFENDERS.
FACTORIES AND SHOPS.
FAMILY ARRANGEMENTS.
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ABBREVIATIONS

USED IN THIS WORK.

A. C. (preceded by date) ..	Law Reports, Appeal Cases, House of Lords, since 1890 (*e.g.* [1891] A. C.)
A.-G.	Attorney-General
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1811
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1831—1842
Adam	Adam's Justiciary Reports (Scotland), 1893—(current)
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822—1826
Adv.-Gen.	Advocate-General
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649
Amb.	Ambler's Reports, Chancery, 2 vols., 1725—1783
And.	Anderson's Reports, Common Pleas, fol., 1 vol., 1535—1605
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740
Anon.	Anonymous
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)
Ashb.	Ashburner's Principles of Equity, 1902
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani
B. & Ad...	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870
Bac. Abr.	Bacon's Abridgment
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854
Baild.	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)
Ball & B.	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814
Bankr. & Ins. R. ..	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855

Bar. & Arn.	Barron & Arnold's Election Cases, 1 vol., 1843—1846
Bar. & Aust.	Barron & Austin's Election Cases, 1 vol., 1842
Barn. (CH.)	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741
Barn. (K. B.)	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734
Barnes	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760
Batt.	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826
Beat.	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830
Beav.	Beavan's Reports, Rolls Court, 36 vols., 1838—1866
Beav. & Wal.	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846
Beaw.	Beawes's Lex Mercatoria
Bellewe	Bellewe's Cases *temp.* Richard II., King's Bench, 1 vol.
Bell, C. C.	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860
Bell, Ct. of Sess. ..	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792
Bell, Ct. of Sess. fol. ..	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795
Bell, Dict. Dec. ..	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833
Bell, Sc. App.	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850
Belt's Sup.	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756
Benl.	Benloe's (or Bendloe's) Reports, King's Bench and Common Pleas, fol., 1 vol., 1515—1627
Ben. & D.	Benloe and Dalison's Reports, Common Pleas, fol., 1 vol., 1357—1579
Bing.	Bingham's Reports, Common Pleas, 10 vols., 1822—1834
Bing. (N. C.)	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840
Bitt. Prac. Cas.	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876
Bitt. Rep. in Ch. ..	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884
Bl. Com	Blackstone's Commentaries
Bl. D. & Osb.	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848
Bli.	Bligh's Reports, House of Lords, 4 vols., 1819—1821
Bli. (N. S.)	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837
Bos. & P.	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804
Bos. & P. (N. R.) ..	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807
Bract.	Bracton De Legibus et Consuetudinibus Angliæ
Bro. Abr.	Sir J. Brooke's Abridgment
Bro. C. C.	W. Brown's Chancery Reports, 4 vols., 1778—1794
Bro. Ecc. Rep.	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872
Bro. (N. C.)	Sir R. Brooke's New Cases, 1 vol., 1515—1558
Bro. Parl. Cas.	J. Brown's Cases in Parliament, 8 vols., 1702—1800
Bro. Supp. to Mor. ..	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.
Bro. Synop.	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827
Brod. & Bing.	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822

Brod. & F.	Brodrick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864
Broun	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845
Brown. & Lush. ..	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866
Brownl.	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624
Bruce	Bruce's Decisions, Court of Session (Scotland), 1714—1715
Buchan.	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813
Buck	Buck's Cases in Bankruptcy, 1 vol., 1816—1820
Bulst.	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626
Bunb.	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741
Burr.	Burrow's Reports, King's Bench, 5 vols., 1756—1772
Burr. S. C.	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776
Burrell	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840
C. A.	Court of Appeal
C. B.	Common Bench Reports, 18 vols., 1845—1856
C. B. (N. S.)	Common Bench Reports, New Series, 20 vols., 1856—1865
C. C. Ct. Cas.	Central Criminal Court Cases (Sessions Papers), 1834—(current)
C. L. R.	Common Law Reports, 3 vols., 1853—1855
C. P. D.	Law Reports, Common Pleas Division, 5 vols., 1875—1880
C. & P.	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841
Cab. & El.	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885
Cald. Mag. Cas. ..	Caldecott's Magistrates Cases, 1 vol., 1777—1786
Calth.	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618
Camp.	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816
Carp. Pat. Cas.	Carpmael's Patent Cases, 2 vols., 1602—1842
Car. & Kir.	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853
Car. & M.	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1843
Cart.	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673
Carth.	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700
Cary	Cary's Reports, Chancery, 1 vol.
Cas. in Ch.	Cases in Chancery, fol., 3 parts, 1660—1697
Cas. Pract. K. B. ..	Cases of Practice, King's Bench, 1 vol., 1655—1775
Cas. Sett.	Cases of Settlements and Removals, 1 vol., 1689—1727
Cas. *temp.* Finch ..	Cases *temp.* Finch, Chancery, fol., 1 vol., 1673—1680
Cas. *temp.* King ..	Select Cases *temp.* King, Chancery, fol., 1 vol., 1724—1733
Cas. *temp.* Talb.	Cases in Equity *temp.* Talbot, fol., 1 vol., 1730—1737
Ch. (preceded by date) ..	Law Reports, Chancery Division, since 1890 (*e.g.*, [1891] 1 Ch.)
Ch. App.	Law Reports, Chancery Appeals, 10 vols., 1865—1875
Ch. D.	Law Reports, Chancery Division, 45 vols., 1875—1890
Ch. Rob.	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808

Char. Pr Cas.	Charley's New Practice Reports, 3 vols., 1875—1876
Char. Cham. Cas. ..	Charley's Chamber Cases, 1 vol., 1875—1876
Chit.	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822
Cl. & Fin.	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—1846
Clay.	Clayton's Reports and Pleas of Assises at Yorke, 1 vol., 1631—1650
Clif. & Rick.	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884
Clif. & Steph.	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872
Cockb. & Rowe	Cockburn and Rowe's Election Cases, 1 vol., 1833
Co. Ent.	Coke's Entries
Co. Inst...	Coke's Institutes
Co. Litt.	Coke on Littleton (1 Inst.)
Co. Rep.	Coke's Reports, 13 parts, 1572—1616
Coll.	Collyer's Reports, Chancery 2 vols., 1844—1846
Coll. Jurid.	Collectanea Juridica, 2 vols.
Colles	Colles' Cases in Parliament, 1 vol., 1697—1713
Colt.	Coltman's Registration Cases, 1 vol., 1879—1885
Com.	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740
Com. Cas.	Commercial Cases, 1895—(current)
Com. Dig.	Comyns' Digest
Comb.	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698
Con. & Law.	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843
Cooke & Al.	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834
Cooke, Pr. Cas. ..	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747
Cooke, Pr. Reg... ..	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742
Coop. G...	G. Cooper's Reports, Chancery, 1 vol., 1792—1815
Coop. Pr. Cas.	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838
Coop. *temp.* Brough. ..	C. P. Cooper's Cases *temp.* Brougham, Chancery, 1 vol., 1833—1834
Coop. *temp.* Cott. ..	C. P. Cooper's Cases *temp.* Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)
Corb. & D.	Corbett and Daniell's Election Cases, 1 vol., 1819
Couper	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885
Cowp.	Cowper's Reports, King's Bench, 2 vols., 1774—1778
Cox, C. C.	E. W. Cox's Criminal Law Cases, 1843—(current)
Cox & Atk.	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846
Cox, Eq. Cas.	S. C. Cox's Equity Cases, 2 vols., 1745—1797
Cox, M. & H.	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, Vol. I., 1846—1852
Cr. & J.	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832
Cr. & M...	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834
Cr. M. & R.	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835
Cr. & Ph.	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841
Cr. App. Rep.	Cohen's Criminal Appeal Reports, 1909 (current)
Craw. & D.	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846

Craw. & D. Abr. C. ..	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838
Cress. Insolv. Cas. ..	Cresswell's Insolvency Cases, 1 vol., 1827—1829
Cripps' Church Cas. ..	Cripps' Church and Clergy Cases, 2 parts, 1847—1850
Cro. Car.	Croke's Reports *temp.* Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641
Cro. Eliz.	Croke's Reports *temp.* Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603
Cro. Jac.	Croke's Reports *temp.* James I., King's Bench and Common Pleas, 1 vol., 1603—1625
Cru. Dig.	Cruise's Digest of the Law of Real Property, 7 vols.
Cunn.	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735
Curt.	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844
Dalr.	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720
Dan.	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823
Dan. & Ll.	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829
Dav. & Mer.	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844
Dav. Pat. Cas.	Davies' Patent Cases, 1 vol., 1785—1816
Dav. Ir.	Davys' (or Davies' or Davy's) Reports (Ireland), 1 vol., 1604—1611
Day	Day's Election Cases, 1 vol., 1892—1893
Dea. & Sw.	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857
Deac.	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840
Deac. & Ch.	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835
Dears. & B.	Dearsly and Bell's Crown Cases Reserved, 1 vol., 1856—1858
Dears. C. C.	Dearsly's Crown Cases Reserved, 1 vol., 1852—1856
Deas & And.	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832
De G.	De Gex's Reports, Bankruptcy, 1 vol., 1844—1848
De G. F. & J.	De Gex, Fisher, and Jones's Reports, Chancery, 4 vols., 1859—1862
De G. & J.	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859
De G. J. & Sm... ..	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865
De G. M. & G.	De Gex, Macnaghten, and Gordon's Reports, Chancery, 8 vols., 1851—1857
De G. & Sm.	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852
Delane	Delane's Decisions, Revision Courts, 1 vol., 1832—1835
Den.	Denison's Crown Cases Reserved, 2 vols., 1844—1852
Dick.	Dickens' Reports, Chancery, 2 vols., 1559—1798
Dig.	Justinian's Digest or Pandects
Dirl.	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677
Dods.	Dodson's Reports, Admiralty, 2 vols., 1811—1822
Donnelly	Donnelly's Reports, Chancery, 1 vol., 1836—1837
Doug. El. Cas.	Douglas' Election Cases, 4 vols., 1774—1776
Doug. (K. B.)	Douglas' Reports, King's Bench, 4 vols., 1778—1785
Dow	Dow's Reports, House of Lords, 6 vols., 1812—1818
Dow & Cl.	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832
Dow. & L.	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849

Dow. & Ry. (K. B.)	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827
Dow. & Ry. (M. C.)	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827
Dow. & Ry. (N. P.)	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823
Dowl.	Dowling's Practice Reports, 9 vols., 1830—1841
Dowl. (N. S.)	Dowling's Practice Reports, New Series, 2 vols., 1841—1843
Dr. & Wal.	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841
Dr. & War.	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—1843
Drew.	Drewry's Reports, Chancery, 4 vols., 1852—1859
Drew. & Sm.	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865
Drinkwater	Drinkwater's Reports, Common Pleas, 1 vol., 1839
Drury *temp.* Nap.	Drury's Reports *temp.* Napier, Chancery (Ireland), 1 vol., 1858—1859
Drury *temp.* Sug.	Drury's Reports *temp.* Sugden, Chancery (Ireland), 1 vol., 1841—1844
Dugd. Orig.	Dugdale's Origines Juridiciales
Dunl. (Ct. of Sess.)	Dunlop, Court of Session Cases (Scotland), 2nd series, 24 vols., 1838—1862
Dunning	Dunning's Reports, King's Bench, 1 vol., 1753—1754
Durie	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642
Dyer	Dyer's Reports, King's Bench, 3 vols., 1513—1581
E. & B.	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—1858
E. & E.	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861
E. B. & E.	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol., 1858—1860
Eag. & Y.	Eagle and Younge's Tithe Cases, 4 vols., 1223—1825
East	East's Reports, King's Bench, 16 vols., 1800—1812
East, P. C.	East's Pleas of the Crown
Ecc. & Ad.	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855
Eden	Eden's Reports, Chancery, 2 vols., 1757—1766
Edgar	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725
Edw.	Edwards' Reports, Admiralty, 1 vol., 1808—1812
Elchies	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754
Eng. Pr. Cas.	Roscoe's English Prize Cases, 2 vols., 1745—1858
Eq. Cas. Abr.	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744
Eq. Rep.	Equity Reports, 3 vols., 1853—1855
Esp.	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810
Exch.	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856
Ex. D.	Law Reports, Exchequer Division, 5 vols., 1875—1880
F. & F.	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867
F. (Ct. of Sess.)	Fraser, Court of Session Cases (Scotland), 5th series, 1898—1906
Fac. Coll. (with date)	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), fol., 1st and 2nd series, 21 vols. 1752—1825

Fac. Coll. (N. S.) (with date)	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), New Series, 16 vols., 1825—1841
Falc.	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751
Falc. & Fitz.	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838
Ferg.	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817
Fitz-G.	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1728—1731
Fitz. Nat. Brev. ..	Fitzherbert's Natura Brevium
Fl. & K.	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1840—1842
Fonbl.	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852
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Part I.—Introductory.

Definition of execution.

1. The word "execution" in its widest sense signifies the enforcement or effectuation of the judgments or orders of courts of justice (*a*). In a narrower sense it means the enforcement of such judgments or orders by a public officer under the writs of *fieri facias, capias, elegit*, sequestration, attachment, possession, delivery, *fieri facias de bonis ecclesiasticis* etc. (*b*).

(*a*) "Execution signifieth in law the obtaining of actuall possession of anything acquired by judgement of law or by a fine executory levied whether it be by the Sherife or by the entry of the party" (Co. Litt. 154 a). See also the definitions in the New English Dictionary (Murray) and Sweet's Law Dictionary.

(*b*) In the R. S. C., "writ of execution" includes writs of *fieri facias, capias*.

PART I. Introductory.

Besides these writs, there are certain analogous methods of enforcing judgments or orders, namely, attachment of debts or garnishee proceedings (*c*), charging orders on stock and shares (*d*), notice in lieu of *distringas* and stop orders (*e*), and appointments of receivers by way of equitable execution (*f*).

Methods of execution before the Judicature Acts.

2. Before the Judicature Acts, generally speaking, the method of execution in the courts of common law was by writ directed to the sheriff or to an officer having equivalent powers, and in the courts of equity by orders working out their own decrees, by orders committing the delinquent to prison, or by writ of sequestration; and in addition to these usual modes of execution, there were other methods of reaching property to answer money claims which were common both to courts of law and equity. But now, as regards judgments or orders for the payment of money, any of the former methods of execution which are appropriate may be used in any Division of the High Court of Justice (*g*).

Part II.—Matters Common to all Modes of Execution.

SECT. 1.—*In respect of what Judgments or Orders Execution may be issued.*

When execution may issue.

3. Only such judgments are enforceable by execution (*h*) as adjudge that (1) one party do recover against another party

elegit, sequestration, and attachment and all subsequent writs that may issue for giving effect thereto. And the term "issuing execution against any party" means the issuing of any such process against his person or property as, under the preceding rules of Ord. 42, is applicable to the case (Ord. 42, r. 8). For the writ of attachment, which is not treated of in this article, see title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., pp. 279 *et seq.* For the execution of sentence in criminal cases, see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 409; PRISONS; SHERIFFS AND BAILIFFS. As to imprisonment for debt, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 337 *et seq.*

(*c*) See p. 90, *post*. "It is doubtful whether this" (attachment of debts) "can be accurately described as an execution" (*Re Smith, Ex parte Brown* (1888), 20 Q. B. D. 321, C. A., *per* FRY, L.J., at p. 329, and see *Fellows* v. *Thornton* (1884), 14 Q. B. D. 335).

(*d*) See p. 101, *post*; *Re Hutchinson, Ex parte Hutchinson* (1885), 16 Q. B. D. 515.

(*e*) See pp. 110, 113, *post*.

(*f*) See p. 115, *post*. This is mere equitable relief, and is not execution in its technical sense, but a substitute for it (*Re Shephard, Atkins* v. *Shephard* (1889), 43 Ch. D. 131, C. A. See *Re Dickinson, Ex parte Charrington & Co.* (1888), 22 Q. B. D. 187, C. A.; *Re Potts, Ex parte Taylor*, [1893] 1 Q. B. 648, C. A., *per* LINDLEY, L.J., at p. 660; *Norburn* v. *Norburn*, [1894] 1 Q. B. 448). For the purposes of the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), the appointment of a receiver is "execution" (*Thompson* v. *Gill*, [1903] 1 K. B. 760, C. A.). A winding-up order has been referred to as "equitable execution" (*Re Chapel House Colliery Co.* (1883), 24 Ch. D. 259, C. A., *per* BOWEN, L.J., at p. 269).

(*g*) R. S. C., Ord. 42, r. 3. An order for the payment of money is for the purpose of this rule wholly distinct from an order to pay into court (*Re Greer, Napper* v. *Fanshawe*, [1895] 2 Ch. 217; and see *De la Pole* (*Lady*) v. *Dick* (1885), 29 Ch. D. 351, C. A.). For the enforcement of judgments and orders other than for the payment of money, see pp. 73—89, *post*.

(*h*) A declaratory judgment (see R. S. C., Ord. 25, r. 5) and orders for

SECT. 1. In respect of what Judgments Execution may be issued.

a sum certain of money, a chattel, or the possession of land; or that (2) one party do pay to another party a sum certain of money (*i*), or perform some other act, such as deliver possession of a chattel, or transfer land, or pull down a wall, or pay money into court; or be restrained from doing some act, such as polluting a stream (*k*).

Every order of the court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect (*l*).

SECT. 2.—*Time when, and Conditions under which, Execution may be issued.*

Entry of judgment or order.

4. As a rule, the entry of the judgment or order is a condition precedent to any execution issuing upon it (*m*).

When execution may issue.

5. Where the judgment or order is for the payment of money or costs, or for the recovery of land, execution may issue immediately (*n*), unless a stay of execution has been ordered by the court (*o*), or a special period for payment has been fixed by the judgment or order (*p*). In other cases, unless otherwise ordered, it may issue in fourteen days (*q*).

Demand unnecessary.

6. Where the judgment or order is for the payment of any money, or for the delivery or transfer of any property, real or

inquiries or to refer to arbitration are examples of other judgments or orders. The award on a submission may, by leave of the court, and even though the time for moving to set it aside has not expired, be enforced as a judgment (Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 12; R. S. C., Ord. 42, r. 31A; *Re A Bankruptcy Petition, Ex parte Caucasian Trading Corporation*, [1896] 1 Q. B. 369, C. A.); or the report of an official or special referee may be adopted by the court, and if so adopted may be enforced as a judgment or order to the same effect (Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 13 (2)). The referee, where the whole matter is sent to him to be tried, may order judgment to be entered (*ibid.*, s. 14); see title ARBITRATION, Vol. I., p. 473.

(*i*) As to the distinction between a judgment that the plaintiff do recover a sum of money against the defendant and an order that the defendant do pay money into court, see title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., p. 298, and cases there cited.

(*k*) See title JUDGMENTS AND ORDERS.

(*l*) R. S. C., Ord. 42, r. 24; and see title JUDGMENTS AND ORDERS. As to enforcing an undertaking, see *D.* v. *A. & Co.*, [1900] 1 Ch. 484; *Carter* v. *Roberts*, [1903] 2 Ch. 312. Orders made under the Lunacy Acts, 1890 and 1891 (53 & 54 Vict. c. 5; 54 & 55 Vict. c. 65), are enforceable by execution issued out of the Central Office of the Supreme Court (Rules in Lunacy, 1892, r. 125).

(*m*) R. S. C., Ord. 42, r. 11; and see p. 16, *post*. But see *Holtby* v. *Hodgson* (1889), 24 Q. B. D. 103. As to entry of judgment, see Ord. 41, rr. 1—10, and see title JUDGMENTS AND ORDERS.

(*n*) *Smith* v. *Smith* (1874), L. R. 9 Exch. 121; *Cruickshank* v. *Moss* (1863), 8 L. T. 439.

(*o*) As to stay of execution, see p. 27, *post*.

(*p*) R. S. C., Ord. 42, r. 17.

(*q*) *Ibid.*, r. 19. This rule is practically obsolete, since a time for performance must, in order that an order to do an act may be enforced by execution, be fixed by the judgment or order (R. S. C., Ord. 41, r. 5; and see p. 6, *post*). It should be noted, however, that certain orders made in the Chancery Division must, to render them enforceable by execution, be followed by a "four day" order, and execution cannot issue until after such order.

SECT. 2. Time when Execution may be issued.

personal, by one person to another, execution may issue without any demand being first made (*r*), and without service of the judgment or order upon the judgment debtor (*s*).

7. Where the judgment or order is conditional, the conditions must first be strictly complied with (*t*).

Limitation.

8. No execution may issue upon a judgment or order for the recovery or payment of money after twelve years from its date (whether it affects land or not (*a*)), unless in the meantime there has been a promise to pay, express or implied (*b*). Judgments and orders are specialties, and except to the extent to which they are for the recovery or payment of money are enforceable for twenty years after the date when they are made (*c*).

On judgments or orders requiring an act to be done.

9. No execution will issue upon a judgment or order requiring an act to be done (*d*), unless such judgment or order states the time (*e*), or the time after service, within which the act is to be done, and unless a copy of such judgment or order, duly indorsed (*f*), is served (*g*) upon the person required to obey it (*h*). If such

(*r*) R. S. C., Ord. 42, r. 1. There are certain exceptions, which will be found noted in their places.

(*s*) *Re* —— *(a Solicitor)* (1884), 33 W. R. 131; *Land Credit Co. of Ireland* v. *Fermoy (Lord), Ex parte Munster* (1870), 5 Ch. App. 323; *Hopton* v. *Robertson* (1884), 23 Q. B. D. 126, n.

(*t*) As to conditional judgments and orders, see p. 7, *post.*

(*a*) *Jay* v. *Johnstone,* [1893] 1 Q. B. 189, C. A., following *Watson* v. *Birch* (1847), 15 Sim. 523, and *Hebblethwaite* v. *Peever,* [1892] 1 Q. B. 124.

(*b*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8; and see, generally, title LIMITATION OF ACTIONS. Leave is necessary after six years; see p. 7, *post.* R. S. C., Ord. 64, r. 13, requiring a month's notice after a delay of one year from last proceeding had, does not apply to any proceeding after judgment (*Houlston* v. *Woodall* (1884), 78 L. T. Jo. 113, C. A.; *Taylor* v. *Roe* (1893), 62 L. J. (CH.) 391). Prior to stat. (1852) 15 & 16 Vict. c. 86, now repealed, if execution was not issued within a year and a day from the judgment, a writ of *scire facias* was necessary in order to obtain the benefit of the judgment (Co. Litt. 290 b; notes to *Underhill* v. *Devereux* (1670), 2 Wms. Saund. 68). Execution issued without a *scire facias* was, however, not a nullity, but voidable only (*Blanchenay* v. *Burt* (1843), 4 Q. B. 707; *Re Spooner and Payne* (1847), 11 Q. B. 136).

(*c*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 3.

(*d*) This does not apply to a negative or prohibitive order (*Selous* v. *Croydon Rural Sanitary Authority* (1885), 53 L. T. 209; *Hudson* v. *Walker* (1894), 64 L. J. (CH.) 204), unless the order, though negative in form, is positive in effect (*Mansell* v. *Jones,* [1905] W. N. 168, C. A.).

(*e*) An order "forthwith" is enough (*Thomas* v. *Nokes* (1868), L. R. 6 Eq. 521; *Halford* v. *Hardy* (1899), 81 L. T. 721). The time cannot be fixed merely by implication (*Townend* v. *Townend* (1905), 93 L. T. 680, C. A.).

(*f*) The requisite formal indorsement is a memorandum in the words or to the effect following, namely: "If you the within-named A. B. neglect to obey this judgment [*or* order] by the time therein limited you will be liable to process of execution for the purpose of compelling you to obey the same judgment [*or* order]" (R. S. C., Ord. 41, r. 5). An order merely extending the time fixed by a prior order does not require indorsement (*Treherne* v. *Dale* (1884), 27 Ch. D. 66, C. A.).

(*g*) An order served after the time fixed for performance is irregular, and may be set aside (*Re Chambers, Duffield* v. *Elwes* (1840), 2 Beav. 268; and see *Adkins* v. *Bliss* (1858), 2 De G. & J. 286, C. A.).

(*h*) R. S. C., Ord. 41, r. 5; and see *Halford* v. *Hardy, supra.* On this subject, generally, see title JUDGMENTS AND ORDERS. If the order states no

judgment or order omits to fix a time, it is not ineffectual, but the court will make a supplemental order (usually a "four day order") fixing the time for performance (*i*).

SECT. 2. Time when Execution may be issued.

10. Where judgment has been entered by the authority of a consent order which has not been registered under the Debtors Act, 1869 (*k*), execution on that judgment is void against creditors of the judgment debtor, but not against the debtor himself (*l*).

Consent order not registered under the Debtors Act, 1869.

11. A writ of execution may not be executed on Sunday (*m*).

Sunday.

SECT. 3.—*Leave to issue Execution.*

12. In the following cases the leave of the court must be obtained before execution is issued (*n*):—

(1) Where the judgment or order is subject to a condition or contingency. In this case the condition or contingency must first be fulfilled and demand must be made upon the judgment debtor and leave to issue obtained (*o*).

Conditional judgment or order.

(2) If six years have elapsed since the date of the judgment or order (*p*).

Lapse of six years.

(3) If any change has taken place by death or otherwise in the parties entitled or liable to execution (*q*).

Change of parties.

time for performance, it is not sufficient if the time is subsequently fixed and merely indorsed on the original order (*Townend* v. *Townend* (1905), 93 L. T. 680, C. A.).

(*i*) *Needham* v. *Needham* (1842), 1 Hare, 633; *Gilbert* v. *Endean* (1878), 9 Ch. D. 259, C. A., *per* JESSEL, M.R., at p. 266; and see *Morley* v. *Clavering* (1861), 30 Beav. 108.

(*k*) 32 & 33 Vict. c. 62, s. 27; and see title JUDGMENTS AND ORDERS. A consent order made at the trial of an action is not within the section (*Re Lennox, Ex parte Lennox* (1886), 16 Q. B. D. 315, C. A.).

(*l*) *Gowan* v. *Wright* (1886), 18 Q. B. D. 201, C. A.; and see *Re Smith, Ex parte Brown* (1888), 20 Q. B. D. 321, C. A.).

(*m*) Sunday Observance Act, 1677 (29 Car. 2, c. 7), s. 6.

(*n*) In the cases of attachment and sequestration the application must be to a judge in chambers by summons, or, in the Chancery Division, to a judge upon motion. In all other cases it must be to a master in chambers, and is usually made *ex parte* in the first instance. In clear cases the order may be made on an *ex parte* application, but in all others the master directs a summons to issue. The application must be supported by an affidavit setting out all the facts which entitle the applicant to the relief sought; see Yearly Practice of the Supreme Court, 1911, notes to Ord. 42, r. 23.

(*o*) R. S. C., Ord. 42, r. 9. For instances of judgments coming within this rule, see *Morgan* v. *Brisco* (1885), 31 Ch. D. 216, and *Bell* v. *Denver* (1886), 54 L. T. 729; and compare *Robinson* v. *Galland* (1889), 37 W. R. 396. For the rights of other parties if the condition is not fulfilled, see p. 10, *post*.

(*p*) R. S. C., Ord. 42, r. 23 (a).

(*q*) *Ibid.*; and see *East End Benefit Society* v. *Slack* (1891), 60 L. J. (Q. B.) 359, and *Jones* v. *Jaggar* (1886), 54 L. T. 731. In the case of the death of the judgment creditor his executors may obtain leave *ex parte* (*Mercer* v. *Lawrence* (1878), 26 W. R. 506), but they must prove that probate has been granted (*Vogel* v. *Thompson* (1847), 1 Exch. 60). For the other effects of a change of parties, see p. 9, *post*, and Yearly Practice of the Supreme Court 1911, p. 577. As to execution against the property of a convict, see p. 15, *post*.

SECT. 3. **Leave to issue Execution.**

(4) Where a husband is entitled or liable to execution upon a judgment or order for or against his wife (*r*).

On a judgment for or against a wife.

(5) Where a party is entitled to execution upon a judgment of assets *in futuro* (*s*).

Assets *in futuro*

(6) Where the judgment or order itself imposes the necessity for leave (*t*).

Goods in hands of receiver.

(7) Where the goods to be seized are in the hands of a receiver (*a*) or a sequestrator (*b*).

Partner.

(8) Where the judgment or order is against a firm, and it is sought to issue execution against an alleged partner who has either (a) not appeared in his own name to the writ of summons, or (b) failed to appear after being served with the writ, or (c) not admitted on the pleadings that he is a partner, or (d) not been adjudged to be a partner (*c*).

Actions between a firm and its members.

(9) In actions between a firm and one or more of its members, or between firms having one or more members in common (*d*).

Company.

(10) Where a party is entitled to execution against the shareholders of a joint stock company upon a judgment recorded against such company, or against a public officer or other person representing such company (*e*).

Railway company.

(11) Where the judgment or order is against a railway company which is unable to meet its engagements and has filed a scheme of arrangement (*f*).

Unpaid capital.

(12) In proceedings under the Companies Clauses Consolidation Act, 1845, against the shareholders of a company in respect of their capital not paid up (*g*).

Sequestration and other writs.

(13) In the case of the following writs: Sequestration against

(*r*) R. S. C., Ord. 42, r. 23 (b). For a husband's rights over his wife's property and liability for her debts, see title HUSBAND AND WIFE.

(*s*) *Ibid.*, r. 23 (c). The case referred to is an action against an executor or administrator, who pleads *plene administravit*, and judgment is given against assets *quando acciderint*, as to which see title EXECUTORS AND ADMINISTRATORS, p. 331, *post*.

(*t*) See, for instance, *Hodges* v. *Fincham* (1875), 1 Ch. D. 9, C. A.

(*a*) *Russell* v. *East Anglian Rail. Co.* (1850), 3 Mac. & G. 104; *Whitehead* v. *Lynes* (1865), 34 L. J. (CH.) 201; *Bowen* v. *Brecon Rail. Co.*, *Ex parte Howell* (1867), L. R. 3 Eq. 541; *Kewney* v. *Attrill* (1886), 34 Ch. D. 345. But goods may be seized after the order for a receiver is made, and before it is perfected (*Edwards* v. *Edwards* (1876), 2 Ch. D. 291, C. A.). The application should be made in the proceeding in which the receiver is appointed, and is known as an application *pro interesse suo* (*Russell* v. *East Anglian Rail. Co.*, *supra*; *Hawkins* v. *Gathercole* (1852), 1 Drew. 12). As to execution against a convict's property, see p. 15, *post*.

(*b*) *Angel* v. *Smith* (1804), 9 Ves. 335, *per* Lord ELDON, L.C.

(*c*) R. S. C., Ord. 48A, r. 8; and see p. 10, *post*. Where liability is not disputed, the order may be made forthwith; otherwise, the issue as to partnership will be ordered to be tried first (*Worcester Banking Co.* v. *Trotter* (1887), 3 T. L. R. 708; and see *Davis* v. *Hyman & Co.*, [1903] 1 K. B. 854, C. A.). See also title PARTNERSHIP.

(*d*) R. S. C., Ord. 48A, r. 10; and see p. 10, *post*.

(*e*) R. S. C., Ord. 42, r. 23; and see p. 12, *post*.

(*f*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 9. As to execution against a railway company, see also p. 13, *post*, and title RAILWAYS AND CANALS.

(*g*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 36. The application must be by motion in open court upon notice (*ibid.*); and see title COMPANIES, Vol. V., p. 695; and p. 12, *post*.

the property of a corporation or its officers (*h*); sequestration for costs (*i*); attachment (*k*); assistance (*l*), and delivery (*m*).

SECT. 3. Leave to issue Execution.

The granting of leave is a matter of discretion (*n*), and the court may refuse leave, or postpone it, or impose terms (*o*), or direct any necessary question to be tried first (*p*).

SECT. 4.—*By and against whom Execution may be issued.*

SUB-SECT. 1.—*In General.*

Judgment creditor and debtor.

13. The person (called the judgment creditor) who is named or ascertained in a judgment or order as entitled to the benefit thereof may issue execution against the person (called the judgment debtor) who is subject to the obligation imposed on him thereby, even if either of such persons is not a party to the cause or matter in which such judgment or order was made (*q*).

Representatives of creditor and debtor.

14. The rights and liabilities of the judgment creditor or judgment debtor (except a merely personal liability) may, by reason of alienation, bankruptcy, or death, devolve upon some other person (*r*), who may then issue, or be the subject of, a process of execution; but the trustee in bankruptcy of a judgment creditor must be made a party before execution can issue (*s*), and in certain cases of equitable execution fresh proceedings may have to be commenced (*a*) and the heir-at-law or personal representative of a deceased judgment debtor brought before the court (*b*).

(*h*) R. S. C., Ord. 42, r. 31; and see p. 81, *post*.

(*i*) R. S. C., Ord. 43, r. 7; and see p. 80, *post*. It is not necessary to show that there is any particular property which is available for payment of the costs (*Hulbert* v. *Cathcart*, [1896] A. C. 470).

(*k*) R. S. C., Ord. 44, r. 2; see title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., pp. 309 *et seq.*, and R. S. C., Ord. 45, r. 1.

(*l*) R. S. C., Ord. 48, r. 1; and see p. 75, *post*.

(*m*) *Ibid.*; and see p. 74, *post*.

(*n*) *Jones* v. *Jaggar* (1886), 54 L. T. 731; *Cocks* v. *Great Western Rail. Co.* (1886), 3 T. L. R. 92, C. A., *per* COTTON, L.J., at p. 93; *Bryant* v. *Torkington* (1897), 13 T. L. R. 315, C. A.; *Re Clements, Ex parte Clements*, [1901] 1 K. B. 260, 263; *Hulbert* v. *Cathcart*, *supra*; *Shrimpton* v. *Sidmouth Rail. Co.* (1867), L. R. 3 C. P. 80. The discretion must be exercised judicially (*Lee* v. *Bude and Torrington Junction Rail. Co.* (1871), L. R. 6 C. P. 576).

(*o*) *Bell* v. *Denver* (1886), 54 L. T. 729.

(*p*) This is expressly provided by the R. S. C., in cases 1, 2, 3, 4, 5, 8, 9, 10, and it is submitted that the court has the same power in the other cases; see R. S. C., Ord. 33, r. 2, and *Taylor* v. *Mostyn* (1886), 33 Ch. D. 226, C. A.

(*q*) R. S. C., Ord. 42, r. 26. After the writ of execution has been issued the judgment creditor and judgment debtor are usually called the execution creditor and execution debtor.

(*r*) But in that case execution can only be issued by leave of the court (see p. 7, *ante*).

(*s*) See *Re Clements, Ex parte Clements, supra*. For the general effect on execution of the bankruptcy of the judgment debtor, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 271 *et seq.*

(*a*) See *Norburn* v. *Norburn*, [1894] 1 Q. B. 448; *Stewart* v. *Rhodes*, [1900] 1 Ch. 386, C. A.; and p. 122, *post*.

(*b*) *Re Shephard, Atkins* v. *Shephard* (1889), 43 Ch. D. 131, C. A.; and see *Thompson* v. *Gill*, [1903] 1 K. B. 760, C. A.

SECT. 4. By and against whom Execution may be issued.

15. If a judgment is given in favour of several partners (*c*) or co-executors (*d*), and one dies, the survivors may issue execution.

If the judgment creditor or debtor dies after a writ of execution is issued it does not, as a rule, abate, but the rights and liabilities devolve upon the executors (*e*).

Conditional judgment.

16. A person who has obtained a conditional judgment or order, and has not complied with the condition within a reasonable time, is considered to have abandoned the benefit of the judgment or order; and any other person interested in the matter may take any proceedings which are either warranted by the judgment or order, or which might have been taken if the judgment or order had not been made (*f*).

Foreign sovereign and ambassador.

17. No execution can be issued against a foreign sovereign, or the ambassador or other public minister of a foreign power (*g*).

Judgment against persons jointly.

18. Where the judgment or order is against persons jointly, execution may issue against their joint property, or may be levied upon the property of any one or more of them (*h*).

SUB-SECT. 2.—*Partners and Partnership Property.*

Judgment against a firm.

19. Where a judgment or order is against a firm, execution may issue: (1) Against any partnership property within the jurisdiction (*i*); (2) against any person who has appeared in his own name, or who has admitted on the pleadings that he is a partner, or who has been adjudged to be a partner; (3) against any person who has been individually served, as a partner, with the writ of summons, and who has failed to appear (*k*). A judgment creditor claiming to be entitled to issue execution against any

(*c*) *Davis & Son* v. *Andrews*, [1884] W. N. 94.

(*d*) *Baird* v. *Thompson* (1884), 14 L. R. Ir. 497. In this case no leave is necessary (*ibid.*).

(*e*) *Ellis* v. *Griffith* (1846), 16 M. & W. 106; and see *Cleve* v. *Vere* (1636), Cro. Car. 450; *Thoroughgood's Case* (1598), Noy, 73; *Clerk* v. *Withers* (1704), 2 Ld. Raym. 1072; *Wharam* v. *Broughton* (1748), 1 Ves. Sen. 180. The exceptions are mentioned *post*, in the sections dealing with the different writs. For the effect of death upon writs of execution already issued, see p. 15, *post*.

(*f*) R. S. C., Ord. 42, r. 2. For an illustration of the application of this rule, see *Talbot* v. *Blindell*, [1908] 2 K. B. 114, which shows that where judgment or relief has been given on a condition, the judgment creditor cannot be compelled to perform the condition, but cannot get execution if he does not do so.

(*g*) Diplomatic Privileges Act, 1708 (7 Ann. c. 12). For the details of this immunity and the persons entitled to it, see titles ACTION, Vol. I., pp. 18 *et seq.*; CONSTITUTIONAL LAW, Vol. VI., pp. 428 *et seq.*

(*h*) The writ of execution must be joint to accord with the judgment (*Clarke* v. *Clement and English* (1796), 6 Term Rep. 525). Execution under it may, however, be levied on the property of either of the joint debtors (*Abbot* v. *Smith* (1774), 2 Wm. Bl. 947; *Herries* v. *Jamieson* (1794), 5 Term Rep. 553).

(*i*) Even though one of the partners is an infant (*Lovell and Christmas* v. *Beauchamp*, [1894] A. C. 607) or is dead (*Ellis* v. *Wadeson*, [1899] 1 Q. B. 714, 718, C. A.).

(*k*) If the partner is an infant, no execution can issue against his private property (*Lovell and Christmas* v. *Beauchamp*, *supra*); if a married woman, it is limited to her separate estate (*Re Handford* (*Frances*) *& Co.*, *Ex parte Handford* (*Frances*), [1899] 1 Q. B. 566, C. A.).

other person as being a member of the firm must obtain an order establishing his liability (*l*); and if such other person has to the knowledge of the judgment creditor left the firm before the action was brought, he must be served with the writ (*m*). If such liability be disputed, an order may be made that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried or determined. But except as against any property of the partnership, a judgment against a firm does not render liable, release, or otherwise affect any member thereof who was out of the jurisdiction when the writ was issued, unless he has been made a party to the action, or has been served with the writ within the jurisdiction before judgment (*n*). The judgment creditor may also bring an action on the judgment against the partners individually (*o*).

Judgment against a partner individually.

20. Where the judgment or order is against a partner or partners individually, no writ of execution can issue against any of the partnership property (*p*); but the judgment creditor may obtain an order (*q*) charging that partner's interest (*r*) in the partnership property, or appointing a receiver of his share of the profits (*s*); and the same rule applies in the case of a cost-book company (*a*).

The effect of the order is that the interest of the debtor is equitably charged to the creditor, but it does not give the execution creditor a right to an account during the continuance of the partnership (*b*). In the case of a partnership other than a cost-book company, the summons and all orders made thereon must be served on the judgment debtor, and on his partners within the jurisdiction, or in the case of a cost-book company on the judgment debtor and the purser of the company, and such service is good service on all the partners, or on the cost-book company, as the case may be (*c*).

(*l*) As to the necessity for obtaining leave, see p. 8, *ante*.

(*m*) R. S. C., Ord. 48A, r. 3, and *Wigram* v. *Cox, Sons, Buckley & Co.*, [1894] 1 Q. B. 792; and see *Re Young, Ex parte Young* (1882), 19 Ch. D. 124, C. A.; *Re Ide, Ex parte Ide* (1886), 17 Q. B. D. 755, C. A.; *Alden* v. *Beckley & Co.* (1890), 25 Q. B. D. 543.

(*n*) R. S. C., Ord. 48A, r. 8. And, generally, as to proceedings by or against firms or partners, see title PARTNERSHIP.

(*o*) *Clark* v. *Cullen* (1882), 9 Q. B. D. 355.

(*p*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 23 (1). Prior to that Act the partner's share in such of the partnership property as was seizable could be taken and sold under a *fi. fa.*; see *Helmore* v. *Smith* (1) (1887), 35 Ch. D. 436, C. A.

(*q*) The order can only be made in the High Court, the Palatinate Chancery Court of Lancaster, or the county court, and must be upon summons (Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 23 (2)).

(*r*) Even if he is a lunatic, and no order in lunacy has been obtained (*Re Seager Hunt* (1899), cited [1900] 2 Ch. 54, C. A.). The rule applies to a partner in a foreign firm having a branch in England (*Brown, Janson & Co.* v. *Hutchinson & Co.*, [1895] 1 Q. B. 737, C. A.).

(*s*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 23 (2).

(*a*) *Ibid.*, s. 23 (4).

(*b*) *Brown, Janson & Co.* v. *Hutchinson & Co.*, [1895] 2 Q. B. 126, C. A. The order is not a protected "transaction" within the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 49 (*Wild* v. *Southwood*, [1897] 1 Q. B. 317).

(c) R. S. C., Ord. 46, r. 1 (a).

SECT. 4. SUB-SECT. 3.—*Companies and other Incorporated Bodies.*

By and against whom Execution may be issued.

Incorporated bodies generally.

21. Speaking generally, judgments and orders for the recovery or payment of money or for the recovery of land against incorporated bodies, whether public or private, are executed in the same manner as against individuals (*d*); and their property, real or personal, may be taken in execution (*e*) even though, in certain circumstances, it is held in trust for public purposes (*f*).

Companies registered under Companies Act, 1908.

22. As regards companies registered under the Companies (Consolidation) Act, 1908 (*g*), execution may issue against the property of the company, but no execution can be issued against the property of any individual member of the company, the judgment creditor's only remedy against the shareholders being a winding-up petition (*h*); and no execution can in any circumstances be issued against a member under a judgment or order against the company (*i*). If the company's assets are not sufficient to satisfy a judgment debt, the judgment creditor may bring a winding-up petition (*k*), and as soon as the petition has been presented all executions may be stayed by the court. If the company is being wound up by or under the supervision of the court, all executions put in force against it after the commencement of the winding-up are void (*l*).

Companies incorporated under Companies Clauses Consolidation Act, 1845

23. In the case of companies incorporated for public purposes under the Companies Clauses Consolidation Act, 1845 (*m*), if execution has issued against the property and effects of the company, and there cannot be found sufficient whereon to levy such execution, then execution can be issued against any of the shareholders to the extent of their shares respectively in the capital of the company not paid up (*n*). Execution against shareholders will

(*d*) Because the word "person" in the R. S. C., includes a body corporate or politic (R. S. C., Ord. 71, r. 1). In some cases mandamus lies to a body to levy a rate to satisfy a judgment; see *Gallsworthy* v. *Selby Dam Drainage Commissioners*, [1892] 1 Q. B. 348, C. A.; *Wolstanton United Urban District Council* v. *Tunstall Urban Council*, [1910] 2 Ch. 347; and title CROWN PRACTICE, Vol. X., p. 87.

(*e*) *Worral Waterworks Co.* v. *Lloyd* (1866), L. R. 1 C. P. 719.

(*f*) *Ibid.*; and see *Arnold* v. *Gravesend Corporation* (1856), 25 L. J. (CH.) 530; *A.-G.* v. *Wilkinson* (1859), 29 L. J. (CH.) 41; *Spokes* v. *Banbury Board of Health* (1865), L. R. 1 Eq. 42; *Re Hull, Barnsley and West Riding Junction Rail. Co.* (1888), 40 Ch. D. 119, 130, C. A.; and compare *Jersey (Earl)* v. *Uxbridge Rural Sanitary Authority*, [1891] 3 Ch. 183. As to sequestration against a corporation which has wilfully disobeyed a judgment or order, see p. 81, *post*; R. S. C., Ord. 42, r. 31; and titles COMPANIES, Vol. V., pp. 325, 326; CORPORATIONS, Vol. VIII., p. 396.

(*g*) 8 Edw. 7, c. 69.

(*h*) *Ibid.*, s. 262.

(*i*) Because there is no privity between the judgment creditor and the individual shareholder. See Lindley on Companies, 6th ed., p. 390.

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 129, 130. For the whole subject of winding up, see title COMPANIES, Vol. V., pp. 390 *et seq.*

(*l*) This subject is fully dealt with in title COMPANIES, Vol. V., pp. 533 *et seq.*

(*m*) 8 & 9 Vict. c. 16.

(*n*) *Ibid.*, s. 36. As to the necessity for obtaining the leave of the court, see p. 8, *ante*.

be granted only after proof of total (*o*) or partial (*p*) failure of execution against the company, and only against persons who were shareholders at the time of the failure of the execution against the company, whether they were so at the date of the judgment or not (*q*). The register of shareholders, which the execution creditor has the right to inspect (*r*), is *primâ facie* evidence that any particular person is or is not a shareholder, but is not conclusive (*s*); and a shareholder who is registered may show that as between himself and the company he is not liable upon the shares held by him (*t*).

Execution may be issued in somewhat similar circumstances against shareholders or public officers of joint stock companies which were registered under the Companies Act, 1844 (*a*), or the Country Bankers Act, 1827 (*b*), and have not been re-registered under the Companies (Consolidation) Act, 1908 (*c*).

Companies regulated by Chartered Companies Act, 1837.

24. Execution may be issued by leave against members of companies regulated by the Chartered Companies Act, 1837 (*d*); the question as to what members are thus liable, and the extent of their liability, depends upon the particular charter (*e*).

Writ of *scire facias*.

25. Formerly, before execution could be issued against a shareholder upon a judgment or order against the company, a writ of *scire facias* had to be sued out, to which the shareholder could plead any matter of defence (*f*), but the simpler procedure of obtaining leave to issue the execution under R. S. C., Ord. 42, r. 23 (*g*), has made this writ practically obsolete.

Railway companies.

26. As to railway companies, none of their rolling stock or plant can be taken in execution (*h*), though other property, such as

(*o*) A mere statement by a solicitor's clerk that abortive writs of *fi. fa.* have issued against the company is insufficient (*Hitchins* v. *Kilkenny Rail. Co.* (1850), 10 C. B. 160). Returns of *nulla bona* to writs of *fi. fa.* coupled with an unanswered affidavit of no effects have been held sufficient evidence (*Rastrick* v. *Derbyshire, Staffordshire and Worcestershire Junction Rail. Co.* (1853), 9 Exch. 149; *Ridgway* v. *Security Assurance Society* (1856), 18 C. B. 686). The return of *nulla bona* need not have been filed before the application is made (*Ilfracombe Rail. Co.* v. *Devon and Somerset Rail. Co.* (1866), L. R. 2 C. P. 15).

(*p*) *Rigby* v. *Dublin Trunk Rail. Co.* (1867), L. R. 2 C. P. 586; *Ilfracombe Rail. Co.* v. *Poltimore* (1868), L. R. 3 C. P. 288. Failure of execution may be proved even if an *elegit* (which is in law "satisfaction") has been issued (*R.* v. *Derbyshire, Staffordshire and Worcestershire Junction Rail. Co.* (1854), 3 E. & B. 784).

(*q*) *Nixon* v. *Green* (1856), 11 Exch. 550.

(*r*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 36.

(*s*) *Rastrick* v. *Derbyshire, Staffordshire and Worcestershire Junction Rail. Co., supra; Edwards* v. *Kilkenny and Great Southern and Western Rail. Co.* (1863), 14 C. B. (N. S.) 526; *Portal* v. *Emmens* (1876), 1 C. P. D. 201, 664, C. A.; *Kipling* v. *Todd* (1878), 3 C. P. D. 350, C. A.

(*t*) *Guest* v. *Worcester etc. Rail. Co.* (1868), L. R. 4 C. P. 9.

(*a*) 7 & 8 Vict. c. 110.

(*b*) 7 Geo. 4, c. 46.

(*c*) 8 Edw. 7, c. 69.

(*d*) 7 Will. 4 & 1 Vict. c. 73.

(*e*) See also title COMPANIES, Vol. V., p. 756.

(*f*) See *Healey* v. *Chichester and Midhurst Rail. Co.* (1870), L. R. 9 Eq. 148.

(*g*) See p. 7, *ante*.

(*h*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 4; see title RAILWAYS AND CANALS.

SECT. 4. By and against whom Execution may be issued.

surplus lands, may be (*i*); but a judgment creditor may obtain the appointment of a receiver, and if necessary a manager, of the company's undertaking (*k*). If a railway company has filed a scheme of arrangement with its creditors, of which notice has been given in the *London Gazette*, no execution may be issued without the leave of the court until after the scheme has been enrolled or rejected by the court (*l*).

Literary and scientific institutions.

27. The property of literary and scientific institutions may be taken in execution, but not that of the commissioners of such an institution (*m*), and, in like manner, commissioners acting under the Commissioners Clauses Act, 1847, are protected (*n*).

Trade union.

A judgment for recovery of money against a trade union can only be enforced against the property of the union (*o*).

SUB-SECT. 4.—*Married Women.*

Married women.

28. Speaking generally, judgments and orders against a married woman can only be enforced against so much of her separate property as is unrestrained from anticipation (*p*). To this rule there are two exceptions, namely: (1) the costs of any proceedings instituted by her may be ordered to be paid out of property which is subject to a restraint on anticipation (*q*); and (2) the income of such property which has accrued due at the date of the judgment or order and is still unpaid may be taken in execution (*r*), but not income which accrued afterwards, even though it is in hand and payable to the married woman at the date of the attempted execution (*s*). If the judgment creditor delays entering judgment in order that more income may accrue before the date of the judgment, the court may refuse to allow execution to issue (*t*).

Where the separate property, although not restrained from anticipation, is held by trustees in trust for the married woman, it cannot, as a rule, be taken under the ordinary writs of execution (*a*),

(*i*) *Re Hull, Barnsley and West Riding Junction Rail. Co.* (1888), 40 Ch. D. 119, C. A.

(*k*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 4.

(*l*) *Ibid.*, s. 9.

(*m*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 23; see title LITERARY AND SCIENTIFIC INSTITUTIONS.

(*n*) Commissioners Clauses Act, 1847 (10 & 11 Vict. c. 16), s. 62.

(*o*) *Taff Vale Railway* v. *Amalgamated Society of Railway Servants*, [1901] A. C. 426, 445; and see title TRADE AND TRADE UNIONS.

(*p*) Married Women's Property Acts, 1882 (45 & 46 Vict. c. 75), ss. 1 (2), 19, and 1893 (56 & 57 Vict. c. 63), s. 1. But in certain circumstances she can be attached for contempt of court; see *Re Turnbull, Turnbull* v. *Nicholas*, [1900] 1 Ch. 180. For the whole subject of the liability of a married woman's property to satisfy her debts, see title HUSBAND AND WIFE.

(*q*) Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 2.

(*r*) *Hood Barrs* v. *Heriot*, [1896] A. C. 174.

(*s*) *Bolitho & Co., Ltd.* v. *Gidley*, [1905] A. C. 98, approving *Whiteley* v. *Edwards*, [1896] 2 Q. B. 48, C. A. On this subject see, further, title HUSBAND AND WIFE.

(*t*) *Colyer* v. *Isaacs* (1897), 77 L. T. 198, C. A.

(*a*) The cases where equitable interests can be taken in execution are noted, *post*, in the sections dealing with the different writs.

and the judgment creditor's remedy, if any, is by the appointment of a receiver (*b*).

SUB-SECT. 5.—*Executors and Administrators.*

29. If the judgment debtor dies after a writ has been delivered to the sheriff for execution, the sheriff must proceed with the execution and seize such property as belonged to the testator at the time of delivery of the writ (*c*). Where, however, the death takes place after the judgment or order and before delivery of the writ of execution to the sheriff, at common law the proceedings had to be revived against the executor or administrator by the writ of *scire facias* before execution could issue, but now, by the rules of court, a writ may issue, by leave of the court, against the personal representative, and the testator's property be seized without any other intermediate proceeding (*d*).

Death of judgment debtor after writ delivered for execution.

30. Execution against a personal representative under a judgment or order against his testator can, in the first instance, only be *de bonis testatoris* or *de bonis intestati* (*e*), but if the sheriff on levying execution finds the assets insufficient, and finds that the personal representative has misapplied or appropriated them, he may make a return of *devastavit* (*f*), and thereupon the judgment creditor can obtain a fresh writ *de bonis propriis* (*g*). But in practice this is not done, and if the assets are insufficient the judgment creditor may bring an action against the executor or administrator on the judgment, suggesting a *devastavit*, and if the *devastavit* be proved judgment may be given and execution issued *de bonis propriis*. Unless a *devastavit* can be proved, execution can only issue against the assets of the testator (*h*).

Execution against personal representative.

SUB-SECT. 6.—*Convicts.*

31. When a person has been sentenced to death or to penal servitude upon a charge of treason or felony, all judgments or orders against him for the payment of money may be executed against his property in the ordinary way, whether such property is in the hands of an administrator or interim curator appointed under the Forfeiture Act, 1870 (*i*), or in the hands of any person who has taken upon himself the possession or management thereof without legal authority (*j*).

Convicts.

(*b*) See *Re Peace and Waller* (1883), 24 Ch. D. 405, C. A.

(*c*) *Wright* v. *Mills* (1859), 4 H. & N. 488; *Thoroughgood's Case* (1598), Noy, 73; *Farrer* v. *Brooks* (1674), 1 Mod. Rep. 188; see p. 26, *post;* compare *Johnson* v. *Pickering*, [1908] 1 K. B. 1, C. A.

(*d*) See pp. 7, 43, *ante.*

(*e*) That is, only the testator's (or intestate's) goods can be seized, not the executor's own.

(*f*) That is, that the personal representative has wasted the assets.

(*g*) That is, against the personal representative's own goods; see *Rock* v. *Leighton* (1700), 2 Salk. 310.

(*h*) For a fuller treatment of this subject, see title EXECUTORS AND ADMINISTRATORS.

(*i*) 33 & 34 Vict. c. 23, s. 27; see also title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 429.

(*j*) Where the property of a convict is vested in an administrator, it is possible that a judgment creditor can issue execution by leave under R. S. C., Ord. 42, r. 23; see p. 7, *ante.*

SECT. 5. **Proceedings on Issue of Writs of Execution.**

SECT. 5.—*Proceedings on Issue of Writs of Execution.*

Procedure on obtaining issue of writ.

32. Writs of execution are issued out of the Writ, Appearance, and Judgment Department of the Central Office, unless the action is proceeding in a District Registry, in which case the writ is issued there. Before issue the following conditions must be complied with. The judgment or order upon which execution is to issue, or an office copy thereof showing the date of entry, must be produced, and the officer must be satisfied that the proper time has elapsed to entitle the judgment creditor to execution (*k*); the judgment creditor or his solicitor must sign and file a *præcipe* in the prescribed form (*l*); and the order giving leave to issue the writ, and an affidavit of service (*m*) when either of these are necessary, and the appropriate form of writ, must be produced.

Indorsements on the writ.

33. Every writ of execution must bear the date of the day on which it is issued, and must be indorsed with the name and place of abode or office of business of the solicitor actually suing out the same; and when the solicitor actually suing out the writ sues out the same as agent for another solicitor, the name and place of abode of such other solicitor must also be indorsed on the writ; and in case no solicitor is employed to issue the writ, then it must be indorsed with a memorandum expressing that the same has been sued out by the plaintiff or defendant in person, as the case may be, mentioning the city, town or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's or defendant's residence, if any such there be (*n*).

Delivery of writ to sheriff for execution.

34. The writ when issued is delivered to the deputy or agent in London of the sheriff of the county in which the writ is to be executed, or sent to the under-sheriff (which in both cases is the same as delivering it to the sheriff himself (*o*)), for execution. If the writ is to be executed in a county palatine, it must first be delivered to the public officer charged with the execution of writs within the county, who will transmit it to the sheriff with his mandate. A receipt for the writ, stating the date of its delivery, must be given by the sheriff on request (*p*).

(*k*) R. S. C. Ord. 42, r. 11.

(*l*) *Ibid.*, r. 12. The solicitor issuing the execution need not be the same as the solicitor on the record (*Tipping* v. *Johnson* (1801), 2 Bos. & P. 357). The *præcipe* must contain the title of the action, the reference to the record, the date of the judgment and of the order, if any, directing the execution to be issued, and the names of the parties or of the firm against whose goods the execution is to be issued. For the prescribed form, see R. S. C., Appendix G.

(*m*) See p. 6, *ante*.

(*n*) R. S. C., Ord. 42, r. 13. As to the indorsement and its effect, and the consequences of indorsing a wrong address, see p. 20, *post*.

(*o*) *Harris* v. *Loyd* (1839), 5 M. & W. 432; *Woodland* v. *Fuller* (1840), 11 Ad. & El. 859. To deliver the writ to the sheriff's officer is irregular (*Triminger* v. *Keene*, [1882] W. N. 106, C. A.).

(*p*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 10 (1).

SECT. 6.—*The Form of Writs of Execution.*

Direction to sheriff.

35. All writs of execution, except writs of sequestration and writs *de bonis ecclesiasticis*, are directed from the King to the sheriff If, however, the sheriff is an interested party, or the office is vacant, the writ is directed to the other sheriff if there are two (*q*), and otherwise to the coroner or elisors as the sheriff's deputies (*r*). The sheriff is the proper officer of the court, and, except in the cases mentioned above, a writ directed to any other person is bad (*s*).

Recital, order and *teste*.

36. Every writ recites the judgment or order under which it is issued, and then commands the sheriff what he is to do, in terms varying according to the particular kind of writ (*t*); and the wording of the command must carefully follow that of the judgment (*a*). Except in the case of a writ of sequestration (*b*), the writ gives an additional command to make a return in the words, "and in what manner you shall have executed this Our Writ make appear to Us in Our said Court immediately after the execution thereof, and have you there then this writ." The writ is tested in the name of the Lord Chancellor, or if that office is vacant, in the name of the Lord Chief Justice of England (*c*).

Form.

37. The form of a writ must follow that prescribed by the rules of court, with such variations as the circumstances may require (*d*).

Date and particulars.

38. Every writ must be dated with the day on which it is issued, and must be indorsed with the required particulars (*e*). Moreover, a writ for recovery of money must also be indorsed with a direction to the sheriff to levy the money sought to be recovered under the judgment or order, stating the amount, and also (if desired) to levy interest thereon at the rate of £4 per cent. per annum from the date of the judgment or order; but where there is an agreement between the parties that more than £4 per cent. interest shall be secured by the judgment or order, then the writ may be indorsed accordingly (*f*). Every judgment debt carries

(*q*) *Letsom* v. *Bickley* (1816), 5 M. & S. 144

(*r*) See title CORONERS, Vol. VIII., p. 248.

(*s*) *Grant* v. *Bagge* (1802), 3 East, 128; *Bowring* v. *Pritchard* (1811), 14 East, 289; see p. 18, *post*.

(*t*) For form of each writ see R. S. C., App. H.

(*a*) *Cobbold* v. *Chilver* (1842), 4 Man. & G. 62; *Phillips* v. *Birch* (1842), 2 Dowl. (N. S.) 97. As to the consequences of irregularity, see p. 28, *post*.

(*b*) See p. 9, *post*.

(*c*) R. S. C., Ord. 2, r. 8.

(*d*) *Ibid.*, Ord. 42, r. 12. For instance, upon the discontinuance of an action a writ may be issued for costs, although no order has been made; and the recitals in the writ must accord with the facts (*Bolton* v. *Bolton* (1876), 3 Ch. D. 276).

(*e*) See p. 16, *ante*.

(*f*) R. S. C., Ord. 42, r. 16; and see *Pyman & Co.* v. *Burt*, [1884] W. N. 100; *Boswell* v. *Coaks* (1887), 57 L. J. (CH.) 101, C. A. The indorsement is in the form, "Levy £ and £ for costs of execution etc., also interest on £ at £4 per cent. per annum from the day of , 19 , until payment besides sheriff's poundage, officer's fees, and costs of levying, and all legal

SECT. 6. The Form of Writs of Execution.

interest at £4 per cent. on both debt and costs from entry of judgment unless otherwise ordered (*g*), until the same is satisfied, and such interest can be levied under a writ of execution (*h*). On a judgment by consent for payment by instalments, interest is not recoverable (*i*).

Issue against persons jointly.

39. Where the judgment or order is against two or more persons jointly the writ must issue against them jointly, and separate writs are irregular (*k*).

SECT. 7.—*By whom Writs of Execution are executed.*

Bailiffs.

40. Although the sheriff, or other officer to whom the writ is addressed, is (with the exceptions mentioned below) responsible for its enforcement, it is actually executed by officers called bailiffs, whose authority is a warrant addressed to them by name by the sheriff or under-sheriff (*l*). The form of the warrant usually follows that of the writ; but a variance between the writ and the warrant is immaterial, since the sheriff, in any proceedings against him, would and could only justify under the writ (*m*).

The warrant is usually addressed to the "bound bailiffs," who have made a declaration under the Sheriffs Act, 1887 (*n*), and are bound to the sheriff in an obligation with sureties for the due execution of their office, and are his regular officers; but, at the request of the judgment creditor, the warrant may be addressed to any other person, who will then be called a "special bailiff," and for whose acts and defaults the judgment creditor, and not the sheriff, will be liable (*o*).

If the writ is addressed to the coroner, and the warrant addressed to the sheriff's bound bailiff, the latter is the coroner's officer, and not the sheriff's (*p*).

Franchises and liberties.

41. If within the territory of the sheriff's jurisdiction there is a franchise or liberty, that is, a district within which some person or body corporate has a right to the return and execution of writs, the warrant is usually issued by the under-sheriff to the bailiff of the liberty, who is solely responsible for its due execution (*q*), and

expenses." The blanks must be filled in when the writ is delivered to the sheriff.

(*g*) Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 17; R. S. C., Ord. 42, r. 16.

(*h*) *Ibid.*

(*i*) *Caudery* v. *Finnerty* (1892), 66 L. T. 684.

(*k*) *Moneypenny* v. *De Massy* (1851), 1 I. Ch. R. 597; and see *Rayner* v. *Jones* (1841), 6 Jur. 133.

(*l*) For the whole subject of the appointment, jurisdiction, rights, and liabilities of the sheriff and his officers, see title SHERIFFS AND BAILIFFS; and for those of the coroner, when acting as the sheriff's deputy, see title CORONERS, Vol. VIII., p. 248.

(*m*) *Rose* v. *Tomblinson* (1834), 3 Dowl. 49.

(*n*) 50 & 51 Vict. c. 55, s. 26.

(*o*) But the bailiff himself, whether bound or special, may be personally responsible for any irregularity (*Futcher* v. *Hinder* (1858), 3 H. & N. 757).

(*p*) *Sarjeant* v. *Cowan* (1833), 1 Cr. & M. 491.

(*q*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 34.

a return of *mandavi ballivo* (*r*) by the sheriff to the writ is a good return. But the writ must in all cases be directed to the sheriff, and is invalid if directed to the bailiff of the liberty (*s*).

SECT. 7. **By whom Writs of Execution are executed.**

The execution can be enforced within the liberty by the officers of the sheriff, and it will be good even if the writ have not a *non omittas* clause (*t*), but the sheriff will be answerable to the owner of the liberty whose rights have been infringed (*a*), though the party suing out the writ will not (*b*). The bailiff may waive his privilege and act as sheriff's officer (*c*). If the writ contain a *non omittas* clause the sheriff's officer puts the execution in force (*d*).

SECT. 8.—*How Writs of Execution are executed* (*e*).

Warrant of bailiff.

42. The writ of execution is delivered to the under-sheriff, who retains it, and indorses the date on which he receives it (*f*), and issues his warrant to the bailiff, authorising him to enforce the execution by the means appropriate to the particular writ (*e*). The writ is the sheriff's justification for the acts done under it, and he is not bound to execute it unless it is in proper form and properly indorsed; but if the writ is regular, he is bound to execute it without question, and it gives him an absolute justification for all acts done under it (*g*), even though the judgment is afterwards set aside (*h*). He should carry out the lawful directions of the execution creditor, and if he disregards them in executing the writ may become a mere trespasser (*i*).

Liability of judgment creditor.

43. The judgment creditor, or his solicitor, is liable if the writ has been wrongfully issued (*k*).

Thus, where the writ of execution is set aside as illegally issued (*l*), or is issued and put in force after the debt has been paid, the client

(*r*) That is, that the sheriff has delivered the writ to the bailiff of the franchise for execution. For returns to writs, see p. 22, *post*.

(*s*) *Grant* v. *Bagge* (1802), 3 East, 128; *Bowring* v. *Pritchard* (1811), 14 East, 289.

(*t*) A *non omittas* clause is a direction to the sheriff in the writ "that you omit not by reason of any franchise or liberty."

(*a*) *Fitzpatrick* v. *Kelly* (1781), cited 3 Term Rep. 740; *Sparks* v. *Spink* (1817), 7 Taunt. 311, *per* PARK, J.

(*b*) *Carrett* v. *Smallpage* (1808), 9 East, 330.

(*c*) *Jackson* v. *Hill* (1839), 10 Ad. & El. 477.

(*d*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 34 (f).

(*e*) For the special methods of enforcing each particular writ, see the section devoted to it, *post*.

(*f*) Statute of Frauds (29 Car. 2, c. 3), s. 15.

(*g*) *Barker* v. *St. Quintin* (1844), 12 M. & W. 441; and see *Hunt* v. *Hooper* (1844), 12 M. & W. 664; and compare *Withers* v. *Parker* (1859), 4 H. & N. 524. For the whole subject of the sheriff's liability in damages for wrongful or negligent execution, see title SHERIFFS AND BAILIFFS.

(*h*) *Rutland's* (*Countess*) *Case* (1604), 6 Co. Rep. 52 b; *Parsons* v. *Loyd* (1772), 3 Wils. 341.

(*i*) *Ives* v. *Lucas* (1823), 1 C. & P. 7. A writ of execution cannot be executed within a royal palace while inhabited or capable of being immediately inhabited by royalty (*Winter* v. *Miles* (1809), 10 East, 578; *A.-G.* v. *Dakin* (1870), L. R. 4 H. L. 338). The Palace of Westminster is not privileged, having ceased to be a royal residence (*Combe* v. *De la Bere* (1882), 22 Ch. D. 316, C. A.).

(*k*) *Barker* v. *Braham* (1773), 2 Wm. Bl. 866.

(*l*) *Perkins* v. *Plympton* (1831), 5 Moo. & P. 731.

SECT. 8. **How Writs of Execution are executed.**

Indorsement.

and solicitor are liable (*m*); but neither of them is liable if it is left to the sheriff to do what is right (*n*).

44. The writ is usually indorsed by the person issuing it:—"The defendant [*or*, person against whom it is issued] is a [] and resides at [] in your bailiwick." This indorsement is not prescribed by any rule, and forms no part of the writ (*o*). The sheriff cannot insist on its being made (*o*). The judgment creditor's solicitor has an implied authority to make it (*p*), but not to give any other direction to the sheriff as to what goods he is to seize (*q*). The question whether this indorsement amounts to a direction to seize any particular goods is in each case one of fact for the jury (*r*). If the indorsement is made and is erroneous, and the sheriff is thereby misled into seizing goods which are not liable to seizure, the solicitor who made the indorsement (*s*) and his client (*t*) are liable in trespass. But neither the solicitor nor the client are liable if the indorsement is correct, so that the sheriff, although he seized the wrong goods, was not misled by it (*a*). The indorsement, being no part of the writ, affords no protection to the sheriff. If the indorsement be to levy on the goods of A. in the house of B., and the sheriff seizes the goods of B., the judgment creditor is not liable to B. (*b*). Apart from the indorsement, if the judgment creditor ratifies the trespass he is liable for it (*c*); but where the sheriff seizes the goods of the wrong person without any direction from the judgment creditor, a subsequent ratification or approval by the latter does not necessarily render him liable for trespass. Contesting an interpleader issue is not a ratification (*d*). If the judgment creditor is present when the bailiff seizes wrong goods he, as well as the sheriff, is liable in trover (*e*). If the judgment creditor, although himself innocent of wrong (and therefore not

(*m*) *Withers* v. *Henly* (1615), 3 Bulst. 96; *Bates* v. *Pilling* (1826), 6 B. & C. 38; *Barker* v. *St. Quintin* (1844), 12 M. & W. 441; *Clissold* v. *Cratchley*, [1910] 2 K. B. 244, C. A.

(*n*) *Jones* v. *Smith* (1867), 16 L. T. 609.

(*o*) *Morris* v. *Salberg* (1889), 22 Q. B. D. 614, 616, C. A.; *Blackburne* v. *Stratton* (1860), 11 I. C. L. R., Appendix, xii.; compare R. S. C., Ord. 42, r. 13, and Appendix H, No. 1.

(*p*) *Jarmain* v. *Hooper* (1843), 6 Man. & G. 827, 849, 850; *Morris* v. *Salberg*, *supra*; *Lee* v. *Rumilly* (1891), 7 T. L. R. 303, C. A.

(*q*) *Smith* v. *Keal* (1882), 9 Q. B. D. 340, C. A.; *Hewitt* v. *Spiers and Pond, Ltd.* (1896), 13 T. L. R. 64, C. A.

(*r*) *Morris* v. *Salberg*, *supra*, at p. 617; *Lane* v. *Sterne* (1862), 10 W. R. 555.

(*s*) *Rowles* v. *Senior* (1846), 8 Q. B. 677; *Lee* v. *Rumilly*, *supra*. If the solicitor expressly directs the sheriff to seize particular goods he is liable (*Powis* v. *Fleming* (1870), 4 I. R. C. L. 404).

(*t*) *Jarmain* v. *Hooper*, *supra*; *Morris* v. *Salberg*, *supra*. So far as *Childers* v. *Wooler* (1859), 2 E. & E. 287, is inconsistent with *Jarmain* v. *Hooper*, *supra*, it is overruled by *Morris* v. *Salberg*, *supra*.

(*a*) *Condy* v. *Blaiberg* (1891), 7 T. L. R. 424, C. A.: *Cronshaw* v. *Chapman* (1862), 7 H. & N. 911; *Hewitt* v. *Spiers and Pond, Ltd.*, *supra*.

(*b*) *Cronshaw* v. *Chapman*, *supra*.

(*c*) *Wilson* v. *Tummon* (1843), 6 Man. & G. 236.

(*d*) *Woollen* v. *Wright* (1862), 1 H. & C. 554, 562, Ex. Ch.; *Toppin* v. *Buckerfield and Cross* (1883), Cab. & El. 157.

(*e*) *Menham* v. *Edmonson* (1799), 1 Bos. & P. 369; *Meredith* v. *Flaxman* (1831), 5 C. & P. 99.

liable in trover), receives the proceeds of a wrongful sale, he is directly liable to account therefor to the person injured (*f*), and is also liable to the sheriff if the latter has had to pay damages (*g*). Further, if the sheriff is misled by the indorsement, and damages for a consequent trespass are recovered against him, he can maintain an action for an indemnity against the judgment creditor (*h*).

Sheriff's duties.

45. The sheriff's duties under the writ are threefold: (1) to the judgment creditor, to obey the writ and any lawful instructions that have been given him; (2) to the judgment debtor, not to do any act not authorised by the writ (*i*); and (3) to the court, to make a return to the writ, if required so to do (*k*).

As to his duty to the judgment creditor, he must carry out the execution as soon as opportunity arises (*l*), and must in the case of a writ of *fieri facias* levy the whole debt if the goods are sufficient (*m*). He is bound to disregard a fraudulent or merely colourable transfer of property made to prevent execution (*n*), but is not bound to seize property already *in custodia legis* (*o*). He must hand the proceeds of the execution to the judgment creditor, and if he does not do so he or his executors may be sued for money had and received (*p*), or a peremptory order for payment may be made against him by the court (*q*). He must keep the goods safely, and not allow them to be seized by a wrongdoer (*r*), but if they are seized by a mob, without negligence on his part, he is not liable (*s*).

(*f*) *Rush* v. *Baker* (1734), Buller, Nisi Prius, 40; *Whitmore* v. *Greene* (1844), 13 M. & W. 104, *per* POLLOCK, C.B., at p. 111.

(*g*) *Standish* v. *Ross* (1849), 3 Exch. 527.

(*h*) *Humphrys* v. *Pratt* (1831), 5 Bli. (N. S.) 154, H. L.; and see *Sheffield Corporation* v. *Barclay*, [1905] A. C. 392.

(*i*) As to this, see p. 28, *post;* and title SHERIFFS AND BAILIFFS.

(*k*) As to this, see p. 22, *post;* and title SHERIFFS AND BAILIFFS.

(*l*) *Dennis* v. *Whetham* (1874), L. R. 9 Q. B. 345; and see *Brown* v. *Jarvis* (1836), 1 M. & W. 704.

(*m*) See *Slade* v. *Hawley* (1845), 13 M. & W. 757.

(*n*) *Bristol (Earl)* v. *Wilsmore* (1823), 2 Dow. & Ry. (K. B.) 755; *Warmoll* v. *Young* (1826), 8 Dow. & Ry. (K. B.) 442; *Willies* v. *Farley* (1828), 3 C. & P. 395; *Scarfe* v. *Hallifax* (1840), 7 M. & W. 288; *Imray* v. *Magnay* (1843), 11 M. & W. 267. And a sale alleged to be fraudulent under stat. (1571) 13 Eliz. c. 5 may be challenged under an execution (*Wood* v. *Dixie* (1845), 7 Q. B. 892; *Hale* v. *Saloon Omnibus Co.* (1859), 4 Drew. 492). The question whether a dealing with the goods was fraudulent is, in an action brought against the sheriff, one for the jury (*Tower Finance and Furnishing Co.* v. *Brown* (1890), 6 T. L. R. 692). See also title FRAUDULENT AND VOIDABLE CONVEYANCES.

(*o*) For example, in the possession of a receiver appointed by the court, *e.g.*, the Court of Lunacy (*Re Winkle*, [1894] 2 Ch. 519, C. A.); but the receiver must actually have been appointed (*Defries* v. *Creed* (1865), 12 L. T. 262; see *Levasseur* v. *Mason and Barry, Ltd.* (1891), 60 L. J. (Q. B.) 659, C. A.). The sheriff will be liable for contempt if he does seize in such circumstances (*Lane* v. *Sterne* (1862), 10 W. R. 555). The execution creditor should be served with the notice of motion to attach (*Russell* v. *East Anglian Rail. Co.* (1850), 14 Jur. 967).

(*p*) *Perkinson* v. *Gilford* (1639), Cro. Car. 539. The action lies immediately the money is received (*Morland* v. *Pellatt* (1828), 8 B. & C. 722).

(*q*) *Botten* v. *Tomlinson* (1847), 16 L. J. (C. P.) 138.

(*r*) *Keene* v. *Dilke* (1849), 4 Exch. 388.

(*s*) *Willis, Winder & Co.* v. *Combe* (1884), Cab. & El. 353.

SECT. 9. **Remedies for Interference with the Sheriff.**

SECT. 9.—*Remedies for Interference with the Sheriff.*

Interference with sheriff.

46. If the sheriff is resisted in the execution of a writ, he may arrest the resisters and commit them to prison, and every such resister is guilty of a misdemeanour (*t*).

It is a contempt of court either to interfere with the sheriff's officer while he is executing the writ, or to take goods out of his custody, or to rescue a prisoner from him (*u*).

When goods have been actually seized, the sheriff has a special property in them, and can maintain an action of trover against any person who removes them (*v*).

SECT. 10.—*The Return to Writs of Execution.*

The return.

47. Most writs of execution contain a direction to the sheriff, after he has executed the writ, to inform the court of what has been done under it. This information is given by a document in writing called the "return," which is signed by the sheriff or under-sheriff and (except in the case of the return *mandavi ballivo* (*w*)) is indorsed on the writ, or attached to it; and it is the duty of the sheriff, if required by notice to make a return (*x*), to file the writ and return in the Central Office (*a*). In practice, the documents are often handed to the judgment creditor's solicitor for filing, but this course is irregular (*b*).

By the strict terms of the direction, the return ought not to be made until the writ has been completely executed, but as a matter of fact a return of partial execution is commonly made, and such a return is no bar to a subsequent complete execution under the same writ (*c*). The return is not necessary to the validity of the execution, and therefore, where a receiving order is made against the judgment debtor after seizure and before the return, the execution is good against the receiver (*d*).

What the return must show.

48. The return must answer the command of the writ in such a manner as, if true, would afford an answer to any action founded upon it (*e*), but a reasonable degree of certainty is all that is necessary (*f*). If the return does not answer the command, or is bad

(*t*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 8 (2). His statutory duty is to raise the *posse comitatus*, and do execution in person (*ibid.*). For the sheriff's remedies, see also title SHERIFFS AND BAILIFFS.

(*u*) See title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., p. 290, and authorities there cited.

(*v*) *Wilbraham* v. *Snow* (1670), 2 Wms. Saund. 47 a; *Clerk* v. *Withers* (1704), 6 Mod. Rep. 290; *Re Davies, Ex parte Williams* (1872), 7 Ch. App. 314, *per* MELLISH, L.J., at p. 317.

(*w*) See p. 19, *ante*, and p. 23, *post*.

(*x*) R. S. C. Ord. 52, r. 11.

(*a*) The return may be amended even after it is filed (*R.* v. *Monmouth (Sheriff)* (1814), 1 Marsh. 344).

(*b*) *Johns* v. *Pink*, [1900] 1 Ch. 296.

(*c*) *Lewis* v. *Holmes* (1847), 10 Q. B. 896; *Jordan* v. *Binckes* (1849), 13 Q. B. 757.

(*d*) *Re Hobson* (1886), 33 Ch. D. 493; and see *Fulwood's Case* (1591), 4 Co. Rep. 64 b, 67 a; and *Hoe's Case* (1600), 5 Co. Rep. 89 a.

(*e*) *Levi* v. *Abbott* (1849), 4 Exch. 588, *per* PARKE, B., at p. 589.

(*f*) *Reynolds* v. *Barford* (1844), 2 Dow. & L. 327.

on the face of it, it may be set aside on summons (*g*), or the court may direct it to be quashed or amended (*h*). If the return is false, the person injured by it has an action for misfeasance against the sheriff, even without proof of malice (*i*), provided he can shew actual damage (*j*). The return is *primâ facie* evidence of the facts stated in it, as between the parties (*k*); and its truth cannot as a rule be investigated upon affidavit, the only remedy being by action (*l*).

Return where writ executed in a liberty.

49. Where a writ not containing a *non omittas* clause (*m*) has to be executed in a liberty, and the sheriff has delivered it to the bailiff of the liberty, the sheriff simply returns *mandavi ballivo* (*n*), and the real return is made by the bailiff direct (*o*), but if the bailiff does not make a return, the sheriff will be ordered to execute the writ (*p*).

Practice as to making a return.

50. In actual practice, except in the case of writs of *elegit* (*q*), in the great majority of cases no formal return to the writ is ever made; but such a return is sometimes necessary in order to found proceedings against the sheriff (*r*).

Notice to make return.

51. If a return is required, the sheriff must be formally called upon by notice to make it; and if he does not comply, proceedings may be taken for his committal (*s*). Such proceedings are by motion on notice (*t*). Proceedings to compel a return may be taken by the judgment debtor, as well as the judgment creditor (*u*).

Order to return.

An order will be refused where the judgment creditor acts as his own bailiff, or appoints a special bailiff, or accepts satisfaction (*a*), or is guilty of negligence in consequence of which the writ has not been executed (*b*). If the writ is lost the sheriff will not be

(*g*) R. S. C., Ord. 70, r. 1; and see p. 30, *post*. The application must be made within a reasonable time (*ibid.*, r. 2).

(*h*) *Cavenagh* v. *Collett* (1821), 4 B. & Ald. 279; *Baker* v. *Davenport* (1826), 8 Dow. & Ry. (K. B.) 606; and see p. 26, *post*.

(*i*) *Brasyer* v. *Maclean* (1875), L. R. 6 C. P. 398, and cases there cited; and see title SHERIFFS AND BAILIFFS.

(*j*) *Wylie* v. *Diver* (1843), 4 Q. B. 553; *Stimson* v. *Farnham* (1872), L. R. 7 Q. B. 175; *Dennis* v. *Whetham* (1874), L. R. 9 Q. B. 345, 347.

(*k*) *Gyfford* v. *Woodgate* (1809), 11 East, 297; *Avril* v. *Warwick* (*Sheriff*) (1834), 3 Nev. & M. (K. B.) 871; *Stubbs* v. *Lainson* (1836), 2 Gale, 122; and see *Brasyer* v. *Maclean*, *supra*.

(*l*) *Goubet* v. *De Crouy* (1833), 1 Cr. & M. 772.

(*m*) See note (*t*), p. 19, *ante*.

(*n*) See note (*r*), p. 19, *ante*.

(*o*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 34; and see *Platel* v. *Dowse* (1838), 4 Bing. (N. C.) 204.

(*p*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 34 (f).

(*q*) See p. 65, *post*.

(*r*) *Sheather* v. *Holt* (1722), 1 Stra. 531; *Shaw* v. *Kirby* (1888), 52 J. P. 182; and see title SHERIFFS AND BAILIFFS.

(*s*) R. S. C., Ord. 52, r. 11.

(*t*) R. S. C., Ord. 44, r. 2; *Jupp* v. *Cooper* (1879), 5 C. P. D. 26. For the procedure, see title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., pp. 309 *et seq.*

(*u*) *Edmunds* v. *Watson* (1816), 7 Taunt. 5; *France* v. *Clarkson* (1834), 2 Dowl. 532; *Williams* v. *Webb* (1843), 2 Dowl. (N. S.) 904; *Richardson* v. *Trundle* (1860), 8 C. B. (N. S.) 474.

(*a*) *Alchin* v. *Wells* (1793), 5 Term Rep. 470; *Hepworth* v. *Sanderson* (1831), 8 Bing. 19; *Hedges* v. *Jordan* (1836), 5 Dowl. 6.

(*b*) *Hart* v. *Weatherley* (1835), 4 Dowl. 171.

SECT. 10. **The Return to Writs of Execution.**

compelled to return it, but he must state what he has done under it (*c*). If the sheriff does not make a return, it is no excuse that the writ, though regular on its face, was invalid (*d*), or that a second writ delivered to him may operate as a *supersedeas* of the first (*e*); but pending an interpleader he is not bound to make a return (*f*).

Expiration of sheriff's office.

If the sheriff's year of office has expired, he may nevertheless be called upon to make a return if he has failed to transfer the writ for execution to the new sheriff; but not after the expiration of six lunar (*g*) months from the date at which he has ceased to hold his office (*h*). The new sheriff cannot be called upon to make the return if the execution has not been transferred (*i*).

SECT. 11.—*Renewal of Writs of Execution.*

Renewal of writ.

52. A writ of execution if unexecuted wholly or in part remains in force for one year only from its issue, unless it is renewed; but such writ may at any time before its expiration, by leave of the court or a judge, be renewed by the party issuing it for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ, either by being marked with a seal of the court bearing the date of the day, month, and year of such renewal, or by such party giving a written notice of renewal to the sheriff signed by the party or his solicitor and bearing the like seal of the court; and a writ of execution so renewed has effect and is entitled to priority according to the time of the original delivery thereof (*j*).

The production of a writ of execution, or of the notice renewing the same, purporting to be marked with the seal of the court showing the same to have been renewed is sufficient evidence of its

(*c*) *R.* v. *Kent* (*Sheriff*) (1814), 1 Marsh. 289.

(*d*) *Jones* v. *Williams* (1841), 8 M. & W. 349. Nor was it an excuse that under the old practice the money in his hands was stopped by an injunction of the Court of Chancery (*Wilson* v. *Aldridge* (1724), 8 Mod. Rep. 315).

(*e*) *Smith* v. *Johnson* (1835), 2 Cr. M. & R. 350. It is apparently no excuse to the sheriff for not returning that a writ of extent has been issued by the Crown (*R.* v. *Devon* (*Sheriff*) (1819), 1 Chit. 643).

(*f*) *Angell* v. *Baddeley* (1877), 3 Ex. D. 49, C. A.; *R.* v. *Hertfordshire* (*Sheriff*) (1836), 5 Dowl. 144. And after an interpleader order was discharged he was allowed a reasonable time to make his return, even though the writs were returnable on a day certain (*ibid.*).

(*g*) *R.* v. *Adderley* (1780), 2 Doug. (K. B.) 463.

(*h*) *Yrath* v. *Hopkins* (1835), 2 Cr. M. & R. 250; *Walker* v. *Davis* (1858), 3 H. & N. 374; *R.* v. *Cornwall* (*Late Sheriff*) (1839), 7 Dowl. 600; Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 28 (3).

(*i*) *Holmes* v. *Elnitts* (1842), 6 Jur. 994.

(*j*) R. S. C., Ord. 42, r. 20. The application for a renewal is made *ex parte*, and supported by an affidavit of the circumstances. Unless it is advisable to preserve the priority of the writ according to its date this rule is not in practice acted upon, but a new writ is issued upon the certificate of a solicitor that nothing has been levied under the first writ. If the writ has been executed in part, a return of it should be obtained and a new writ issued for the amount unlevied. If the return cannot be obtained by reason of the sheriff who levied having been out of office for six months, the new writ will be issued on the certificate of a solicitor. If the first writ has issued out of a District Registry the application is made there (R. S. C., Ord. 35, r. 5).

having been so renewed (*k*). During the year of its currency the writ remains in force until it is completely executed (*l*).

SECT. 12.—*Several or Successive Writs.*

Successive writs.

53. As a rule a judgment creditor cannot split up his judgment and issue separate writs for separate parts of it (*m*). If, however, the judgment or order is for the recovery or payment of money, and at the same time for the recovery of property other than money, the appropriate writs for the enforcement of the two parts of the judgment or order may issue simultaneously or successively; and if it is for the recovery or payment of money and costs two separate writs may issue, but the second may only be for costs, and must be issued within eight days after the first (*n*). If the judgment or order is for the payment of money or costs, any number of writs of *fieri facias*, or *elegit*, addressed to the sheriffs of the different counties or places in which the judgment debtor's assets are may be issued simultaneously (*o*), and a writ of *fieri facias* and a writ of *elegit* may be simultaneously issued in the same county. A writ issued in a county other than that in which the venue of the action is laid is called a *testatum* writ, and formerly it was necessary to issue an original writ in the county of the venue in order to justify the others (*p*), but the omission of the *testatum* clause from the prescribed form of writ has made this practice obsolete.

Issue of two or more writs.

54. If the judgment creditor has issued more than one writ in the same county he may use which he pleases, but if a seizure be made under one, a seizure cannot be made under the others without obtaining a return of the first (*q*). If, however, the goods seized under the first writ are not the goods of the judgment debtor, a seizure may take place under the second writ without a return to the first (*r*), the test being whether anything has been done under the first writ which renders its existence necessary for the justification of the sheriff (*a*).

Where two or more writs of the same kind have been simultaneously issued in different counties, they may all be executed, but care must be taken that too much is not levied (*b*).

Alias writ.

55. Where a writ of execution has been issued and returned and the judgment or order is still unsatisfied, another of the same kind may be issued into the same county. This is called an *alias*

(*k*) R. S. C., Ord. 42, r. 21.

(*l*) *Jordan* v. *Binckes* (1849), 13 Q. B. 757.

(*m*) *Forster* v. *Baker*, [1910] 2 K. B. 636, 642. For this reason assignees of part of a judgment debt cannot issue execution (*ibid.*).

(*n*) R. S. C., Ord. 42, r. 18.

(*o*) *I bid.*, r. 17; and see *Lee* v. *Dangar, Grant & Co.*, [1892] 2 Q. B. 337, C. A.

(*p*) See, for instance, *Brand* v. *Mears* (1789), 3 Term Rep. 388; and *Cowperthwaite* v. *Owen* (1790), 3 Term Rep. 657.

(*q*) *Miller* v. *Parnell* (1815), 6 Taunt. 370; *Hodgkinson* v. *Whalley* (1831), 2 Cr. & J. 86; *Chapman* v. *Bowlby* (1841), 8 M. & W. 249; *Andrews* v. *Saunderson* (1857), 1 H. & N. 725; *Re Ford, Ex parte Ford* (1886), 18 Q. B. D. 369; *Re A Debtor, Ex parte Smith*, [1902] 2 K. B. 260, C. A.

(*r*) *Re A Debtor, Ex parte Smith, supra.*

(*a*) *Andrews* v. *Saunderson, supra, per* POLLOCK C.B., approved in *Re A Debtor, Ex parte Smith, supra*, at pp. 267, 268.

(*b*) *Lee* v. *Dangar, Grant & Co., supra.*

SECT. 12. Several or Successive Writs.

writ, and after it has been returned another can be issued called a *pluries* writ (*c*).

SECT. 13.—*Priority of Writs.*

Priority of writs.

56. If several writs of the same description are delivered to the sheriff by different judgment creditors for execution against the same judgment debtor, he must execute them in order, according to the day and hour at which each was delivered to him (*d*); but a renewed writ ranks according to the time of the delivery of the original (*e*). Delivery to the sheriff's deputy in London is equivalent to delivery to the sheriff himself (*f*). If the first judgment creditor orders the sheriff to suspend execution, he will lose his priority if another writ is delivered during the suspension (*g*).

If several writs are handed to the sheriff at the same moment by one solicitor acting for several judgment creditors, there is no priority; the sheriff must execute them simultaneously, and make a return to that effect, and he cannot call upon the solicitor to say which is to be executed first (*h*).

Execution of writ out of order of priority.

57. If the sheriff executes a writ which ought to have been postponed to another, and the goods are actually sold, the purchaser gets a good title, and the money must be handed to the creditor whose writ was executed (*i*), unless he had notice of the prior writ (*k*); but the creditor whose writ was entitled to priority has an action against the sheriff (*l*).

Seizure under several writs.

58. If several writs have to be executed against the same judgment debtor, the sheriff need not make separate seizures, but one seizure enures for the benefit of all in order of priority (*m*).

SECT. 14.—*Amendment of Writ* (*n*).

Amendment of writ.

59. If there is a defect or error in any writ, indorsement, or return, the court may allow it to be amended upon such terms as may be just (*o*); and, as a general rule, an amendment should be allowed, if it can be made without injustice (*p*).

(*c*) The writs only differ from the ordinary writ in a recital "as before we have commanded you" or "as often we have commanded you."

(*d*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 26 (1), re enacting the Statute of Frauds (29 Car. 2, c. 3), s. 15; and see *Hutchinson* v. *Johnston* (1787), 1 Term Rep. 729; *Hunt* v. *Hooper* (1844), 12 M. & W. 664; *Guest* v. *Cowbridge Rail. Co.* (1868), L. R. 6 Eq. 619.

(*e*) R. S. C., Ord. 42, r. 20.

(*f*) *Woodland* v. *Fuller* (1840), 11 Ad. & El. 859, *per* PATTESON, J., at p. 867.

(*g*) *Hunt* v. *Hooper, supra.*

(*h*) *Ashworth* v. *Uxbridge* (*Earl*) (1842), 12 L. J. (Q. B.) 39.

(*i*) *Smallcomb* v. *Buckingham* (1697), 5 Mod. Rep. 376; *Rybot* v. *Peckham* (1778), cited 1 Term Rep. 731, n.; *Payne* v. *Drewe* (1804), 4 East, 523.

(*k*) *Hutchinson* v. *Johnston, supra.*

(*l*) *Smallcomb* v. *Buckingham, supra; Payne* v. *Drewe, supra.*

(*m*) *Jones* v. *Atherton* (1816), 7 Taunt. 56; *Re Henderson, Ex parte Shaw*, [1884] W. N. 60, C. A.; *Re Hille India Rubbber Co.* (No. 2), [1897] W. N. 20.

(*n*) See also p. 30, *post.*

(*o*) R. S. C., Ord. 28, r. 12; Ord. 70, r. 1.

(*p*) For the general principles upon which amendments of proceedings are allowed, see title PRACTICE AND PROCEDURE.

SECT. 14. Amendment of Writ.

Leave will be given to amend the writ even after levy where it has been issued for too small or too large a sum (*q*), also where the date in the writ does not correspond with the date of the judgment (*r*). The indorsement will be amended when the wrong amount is inserted (*s*), or interest is omitted either on judgment debt or costs (*a*).

SECT. 15.—*Stay of Execution.*

Stay of execution.

60. Where a judgment or order is for the payment of a sum of money or costs, the court may stay execution until such time as it thinks fit (*b*); and it has an inherent jurisdiction over all judgments or orders which it has made, under which it can stay execution in all cases (*c*). A stay may be granted even upon facts which have arisen too late to be pleaded in the action (*d*).

The application for a stay should, if possible, be made at the hearing, but there is jurisdiction to grant it afterwards (*b*). It must be made to the court or division which made the judgment or order (*e*). When a stay is sought pending an appeal, the application must be made to the court of first instance, and, if it is refused, a further application may be made to the Court of Appeal (*f*); but if the action has been dismissed, the court of first instance has no jurisdiction to stay execution (except for costs (*g*)), and the application must be made to the Court of Appeal direct (*h*). An appeal does not operate as a stay unless the court of first instance, or the Court of Appeal, so directs (*i*). As a rule, a stay of execution as to costs pending an appeal is only granted upon the terms that the respondent's solicitor undertakes to repay the costs paid to him in the event of the appeal being successful, but this practice is not invariable (*k*). The court has an absolute and unfettered discretion as to the granting or refusing a stay, and as to the terms upon which it will grant it (*l*), and will as a rule only grant it if there are special

(*q*) *Laroche* v. *Wasbrough* (1788), 2 Term Rep. 737; *Hunt* v. *Passmore* (1833), 2 Dowl. 414, where the application was for a new writ (this is not now the practice); *Arnell* v. *Weatherby* (1835), 1 Cr. M. & R. 831.

(*r*) *Re Cobbett* (1861), 10 W. R. 40.

(*s*) *Evans* v. *Manero* (1841), 7 M. & W. 463.

(*a*) *Re London Wharfing and Warehousing Co.* (1885), 54 L. J. (CH.) 1137.

(*b*) R. S. C., Ord. 42, r. 17.

(*c*) *Polini* v. *Gray, Sturla* v. *Freccia* (1879), 12 Ch. D. 438, C. A.

(*d*) R. S. C., Ord. 42, r. 27.

(*e*) *Wright* v. *Redgrave* (1879), 11 Ch. D. 24. When made after the hearing it should be on summons before a master in the King's Bench Division, or on summons or motion in the Chancery Division.

(*f*) R. S. C., Ord. 58, r. 17.

(*g*) *Otto* v. *Lindford* (1881), 18 Ch. D. 394.

(*h*) *Wilson* v. *Church* (1879), 11 Ch. D. 576, C. A.

(*i*) R. S. C., Ord. 58, r. 16.

(*k*) *A.-G.* v. *Emerson* (1889), 24 Q. B. D. 56, C. A.; see also *Grant* v. *Banque Franco-Egyptienne* (1878), 3 C. P. D. 202, C. A.; *Merry* v. *Nickalls* (1873), 8 Ch. App. 205; *Cooper* v. *Cooper* (1876), 2 Ch. D. 492, C. A.; *Morgan* v. *Elford* (1876), 4 Ch. D. 352, 388, C. A.; *Brewer* v. *Yorke, Yorke* v. *Brewer* (1882), 20 Ch. D. 669, C. A.; *Re Falconar's Trusts, Bradford* v. *Young* (1884), 28 Ch. D. 18.

(*l*) *A.-G.* v. *Emerson, supra.*

SECT. 15. **Stay of Execution.**

circumstances, which must be deposed to on affidavit unless the application is made at the hearing (*m*).

Stay without an order.

61. Execution may be stayed in some circumstances without an order to stay having been made (*n*). When one writ of *fieri facias* has been executed by seizure, another between the same parties cannot be issued regularly until the return of the first (*o*), and an order for an interpleader issue has also the effect of a stay (*p*). When a garnishee order absolute has been made against a judgment debtor attaching the judgment debt, it operates as a stay of execution as against the judgment creditor (*q*).

Where a creditor who has obtained a judgment in the High Court takes an order for payment by instalments in the county court, he cannot afterwards issue execution in the High Court (*r*).

SECT. 16.—*Wrongful and Irregular Execution.*

Wrongful execution.

62. An execution is wrongful where it is neither authorised nor justified by the writ of execution or by the judgment under which it is issued; or where the writ is issued maliciously and without reasonable or probable cause (*a*); or where unfair means, such as the procuring of a search warrant, are used to enable the bailiff to enter into the premises of the execution debtor (*b*). Thus, where a plaintiff maliciously and without reasonable or probable

(*m*) *Barker* v. *Lavery* (1885), 14 Q. B. D. 769, C. A.; *The Annot Lyle* (1886), 11 P. D. 114, C. A.; see, however, *M'Carthy* v. *Cork Steam Packet Co.* (1885), 16 L. R. Ir. 194. The application should be made promptly (*Tuck* v. *Southern Counties Deposit Bank* (1889), 42 Ch. D. 471, C. A.; *Automatic Weighing Machine Co.* v. *Combined Weighing and Advertising Machine Co.*, [1889] W. N. 130, C. A.). Examples of special circumstances are: that an appeal would be nugatory if stay was refused, by reason of the poverty of the respondent (*Wilson* v. *Church*, (1879), 11 Ch. D. 576, C. A.); two years' absence from England without address of a party to whom money in court was ordered to be paid out (*Re Falconar's Trusts*, *Bradford* v. *Young* (1884), 28 Ch. D. 18, C. A.); that an administration order has been made against the estate of a debtor dead since judgment and before execution issued (*Ranken* v. *Harwood* (1846), 10 Jur. 794). An allegation on an appeal that there has been misdirection at the trial is not sufficient (*Monk* v. *Bartram*, [1891] 1 Q. B. 346, C. A.); nor is the fact that the respondents to an appeal are a Scotch company (*Re Queensland Mercantile Agency Co.* (1891), 61 L. J. (CH.) 48); nor that the party wishes to consider the advisability of appealing (*Webber* v. *London, Brighton, and South Coast Rail. Co.* (1881), 15 L. J. (Q. B.) 154, C. A.); nor that the witnesses have been indicted for perjury (*Warwick* v. *Bruce* (1815), 4 M. & S. 140).

(*n*) As to the effect of a receiving order in bankruptcy, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 271; and of a winding-up order against a company, title COMPANIES, Vol. V., pp. 534 *et seq.*, 538, 583.

(*o*) *Miller* v. *Parnell* (1815), 6 Taunt. 370; *Chapman* v. *Bowlby* (1841), 8 M. & W. 249; *Re A Debtor, Ex parte Smith*, [1902] 2 K. B. 260, C. A.

(*p*) *Angell* v. *Baddeley* (1877), 3 Ex. D. 49, C. A.; *Re Ford, Ex parte Ford* (1886), 18 Q. B. D. 369; see *Re Follows, Ex parte Follows*, [1895] 2 Q. B. 521.

(*q*) *Re Connan, Ex parte Hyde* (1888), 20 Q. B. D. 690, C. A. An order *nisi* is not a stay (*Re H. B.*, [1904] 1 K. B. 94, C. A.).

(*r*) *Jones* v. *Jenner* (1856), 25 L. J. (EX.) 319, *per* POLLOCK, C.B.; *Montgomery & Co.* v. *De Bulmes*, [1898] 2 Q. B. 420, C. A.

(*a*) *Cash* v. *Wells* (1830), 1 B. & Ad. 375; *Pinches* v. *Harvey* (1841), 1 Q. B. 868; *Gillett* v. *Aston* (1842), 12 L. J. (Q. B.) 5; *Parry* v. *Great Ship Co.* (1863), 4 B. & S. 556; *Bartlett* v. *Stinton* (1866), L. R. 1 C. P. 483.

(*b*) *Anon.* (1758), 2 Keny. 372.

cause indorses on the writ a larger amount than is due (*c*); or maliciously issues a second writ of *fieri facias* whilst the sheriff retains unsold in his hands goods seized under the first (*d*); or maliciously and without reasonable or probable cause issues a writ of extent (*e*), the executions are wrongful, and on proof of malice the person at whose instance they are levied will be liable in damages in an action on the case (*f*). Also on proof of malice an execution will be treated as wrongful where the execution creditor after he has become bound by composition proceedings (*g*), or a scheme of arrangement under the Bankruptcy Acts (*h*) neglects to withdraw the sheriff, or where he levies for a debt provable in bankruptcy on the goods of a bankrupt who has obtained his discharge (*i*). So, too, an execution is wrongful where the indorsement on a writ directs the sheriff to levy at a wrong address or on the goods of a person other than the execution debtor (*j*); or where the goods are seized under a writ of *fieri facias* issued after payment of the whole of the judgment debt (*k*); and in such case an action for trespass lies at the instance of the person aggrieved without proof of malice (*l*); for where a judgment debt has been paid, the judgment is no longer of any force or effect whatsoever, and an execution issued under it is void *ab initio*. Executions are wrongful also when levied after a stay has been ordered by the court or a judge (*m*), or agreed upon between the parties (*n*); or where the warrant issued by the sheriff to the person issuing the writ or his attorney is wilfully altered and a wrongful use made thereof (*o*);

(*c*) *Gilding* v. *Eyre* (1861), 10 C. B. (N. S.) 604; *Woolley* v. *Morgan* (1887), 4 T. L. R. 211; *Wentworth* v. *Bullen* (1829), 9 B. & C. 840; *De Medina* v. *Grove* (1846), 10 Q. B. 152; *Churchill* v. *Siggers* (1854), 3 E. & B. 929; *Mellin* v. *Pedley* (1879), 68 L. T. Jo. 134. If the judgment is for the amount indorsed, no action will lie until it is set aside (*Huffer* v. *Allen* (1866), L. R. 2 Exch. 15).

(*d*) *Waterer* v. *Freeman* (1617), Hob. 205; explained in *Wren* v. *Weild* (1869), L. R. 4 Q. B. 730, 736; *Holmes* v. *Newlands* (1843), 13 L. J. (Q. B.) 82.

(*e*) *Craig* v. *Hasell* (1843), 4 Q. B. 481.

(*f*) If, however, the executions strictly follow the judgment they will be allowed to stand, but the injured party will have his action on the case against the judgment creditor for the special damage caused.

(*g*) *Phillips* v. *General Omnibus Co.* (1880), 50 L. J. (Q. B.) 112.

(*h*) *Seaton* v. *Deerhurst* (*Lord*), [1895] 1 Q. B. 853, C. A.

(*i*) *Davis* v. *Shapley* (1830), 1 B. & Ad. 54.

(*j*) *Morris* v. *Salberg* (1889), 22 Q. B. D. 614, C. A.; *Jarmain* v. *Hooper* (1843), 7 Scott (N. R.), 663; see also *Smith* v. *Critchfield* (1885), 14 Q. B. D. 878, C. A.; *De Coppett* v. *Barnett* (1901), 17 T. L. R. 273, C. A., *Hilliard* v. *Hanson* (1882), 21 Ch. D. 69, C. A.; and *Salberg* v. *Morris* (1887), 4 T. L. R. 47.

(*k*) *Clissold* v. *Cratchley*, [1910] 2 K. B. 244, C. A.

(*l*) *Ibid.* It is important to notice the distinction between an action for trespass, such as *Clissold* v. *Cratchley*, *supra*, and an action on the case, such as *Scheibel* v. *Fairbain* (1799), 1 Bos. & P. 388 (no action on the case without proof of malice where the execution creditor, before payment, sued out a writ of *capias*, and failed to countermand it before payment); and *Gibson* v. *Chaters* (1800), 2 Bos. & P. 129 (writ of *alias capias* sued out after debt paid). See also *De Medina* v. *Grove*, *supra*, where an action against the execution creditor and his solicitor for levying for the whole amount, after part payment to the knowledge of both, failed for want of proof of malice and the want of reasonable and probable cause.

(*m*) *Winter* v. *Lightbound* (1720), 1 Stra. 301; and see p. 27, *ante*.

(*n*) *Veal* v. *Warner* (1669), 1 Mod. Rep. 20; *Cash* v. *Wells* (1830), 1 B. & Ad. 375; *Bikker* v. *Beeston* (1860), 29 L. J. (EX.) 121; Chitty's Archbold, 14th ed., p. 789

(*o*) *Hale* v. *Castleman* (1746), 1 Wm. Bl. 2.

SECT. 16. **Wrongful and Irregular Execution.**

or where the writ is executed on a Sunday (*p*), or after notice from the execution creditor not to proceed and to withdraw from possession of the goods taken under it (*q*); or where issued against the goods of any ambassador or other public minister of any foreign Prince or State, authorised and received as such by His Majesty, his heirs or successors, or the domestic servant of any such ambassador or other public minister, for which the execution creditor renders himself liable to statutory penalties (*r*).

Not necessarily void *ab initio.*

63. Wrongful executions are, however, not necessarily all void *ab initio;* thus, where a sheriff does what he has no authority to do, *e.g.*, breaks into an execution debtor's premises, he will be liable for the trespass, but the execution remains good (*s*). And an execution issued for the amount of the judgment, although that amount be more than is actually due at the time, is not wrongful so long as the judgment stands, and unless the judgment is first set aside no action will lie for issuing execution for that amount, even though it be alleged that the judgment was signed and the execution issued maliciously and without reasonable and probable cause (*a*).

Irregular execution.

64. An execution is irregular where any of the requirements of the rules of court, or of the practice for the time being, have not been complied with, and the proceedings will be set aside or amended or otherwise dealt with in such manner and upon such terms as the court shall think fit (*b*).

If the writ of execution be irregular or ought not to have issued (*c*), the master in chambers will, in general, set it aside, and, if goods or money have been levied under it, order them to be restored, or if the party be in custody under it, order him to be discharged (*d*). And where an execution has been irregularly executed, he will, as a rule, order such restoration or discharge (*e*).

Where an execution is set aside for mere irregularity, in the absence of malice or bad faith, or actual damage, the court will generally make it a term of the order that no action shall be brought at the instance of the person aggrieved.

(*p*) Sunday Observance Act, 1677 (29 Car. 2, c. 7), s. 6.

(*q*) *Walker* v. *Hunter* (1845), 2 C. B. 324. But the sheriff will not be liable for acts of his officers done after he has countermanded the execution of the writ (*Brown* v. *Copley* (1844), 2 Dow. & L. 332).

(*r*) Diplomatic Privileges Act, 1708 (7 Ann. c. 12), s. 4.

(*s*) *Semayne's Case* (1604), 5 Co. Rep. 91; 1 Smith, L.C., 11th ed., 104; see also the opinion of BRAMWELL, B., in *Hooper* v. *Lane* (1857), 6 H. L. Cas. 443.

(*a*) *Huffer* v. *Allen* (1866), L. R. 2 Exch. 15, where, however, *Churchill* v. *Siggers* (1854), 3 E. & B. 929, was not cited. Where the amount indorsed on a writ of summons is reduced by a payment on account after action, and the plaintiff, in default of appearance, signs judgment for and issues execution for the full amount of the original indorsement without giving credit for such payment, the defendant will be entitled to have the judgment set aside (*Hughes* v. *Justin*, [1894] 1 Q. B. 667, C. A.; unless leave to amend had been given; see *Hodges* v. *Callaghan* (1857), 2 C. B. (N. S.) 306; *Armitage* v. *Parsons*, [1908] 2 K. B. 410, C. A.).

(*b*) R. S. C., Ord. 70, r. 1.

(*c*) *Turner* v. *Pulman* (1848), 2 Exch. 513; *Backhouse* v. *Mellor*, *Proudhon* v. *Mellor* (1859), 28 L. J. (EX.) 141.

(*d*) See Chitty's Archbold, 14th ed., p. 830.

(*e*) *Rhodes* v. *Hull* (1857), 26 L. J. (EX.) 265.

Examples of irregularity.

65. An execution is irregular where it is levied by an unauthorised officer (*f*), or where the writ does not follow the judgment precisely in the names of the parties (*g*), or the terms of the judgment (*h*), or where a several execution is issued on a joint judgment (*i*), or where there is an error in the amount ordered to be recovered or paid (*k*), or in the case of a writ for the recovery of possession of land a misdescription of the land, not explained on the face of the writ. In all these cases the executions will be set aside unless the irregularity is waived by the execution debtor (*l*), or set right by amendment, which will generally be done (*m*), unless bankruptcy on the part of the execution debtor intervenes, in which case the execution will be set aside (*n*). But although the writ be irregular (*o*), yet, the party at whose suit it is issued and his solicitor may justify under it (*p*), unless it has been set aside for irregularity (*p*), in which case the execution creditor and his solicitor are liable in trespass for an arrest or seizure made under it (*q*). Where an execution is irregular, whether it be set aside or not, the sheriff and his officer, and all persons acting under the sheriff, are, in general, protected by the writ, provided it be not void on the face of it, or did not issue from a court without jurisdiction, and provided that he or they do not join in the same plea with the party (*r*).

Title of purchaser.

66. The title of a *bonâ fide* purchaser from the sheriff will be good though the execution be irregular, unless it was altogether void, or the goods were the goods of a stranger and not of the party against whom the execution issued (*s*), in which latter case

(*f*) *Rhodes* v. *Hull* (1857), 26 L. J. (EX.) 265.

(*g*) *Fisher* v. *Magnay* (1843), 6 Scott (N. R.), 588.

(*h*) *Phillips* v. *Birch* (1842), 4 Man. & G. 403.

(*i*) *Moneypenny* v. *De Massy* (1851), 1 I. Ch. R. 597,

(*k*) *Webber* v. *Hutchins* (1841), 8 M. & W. 319; *Cobbold* v. *Chilver* (1842), 1 Dowl. (N. S.) 726; *King* v. *Birch* (1842), 3 Q. B. 425.

(*l*) *Lewis* v. *Gompertz* (1837), 1 Jur. 984 (request for time).

(*m*) Amendment of variance between writ and judgment was allowed in *Arnell* v. *Weatherby* (1835), 3 Dowl. 464; *M'Cormack* v. *Meiton* (1834), 1 Ad. & El. 331.

(*n*) *Hunt* v. *Pasman* (1815), 4 M. & S. 329; *Webber* v. *Hutchins*, *supra*.

(*o*) Where there is no writ, or only a void writ, trespass lies (*Cameron* v. *Lightfoot* (1778), 2 Wm. Bl. 1190; *Parsons* v. *Loyd* (1772), 3 Wils. 341).

(*p*) *Philips* v. *Biron* (1722), 1 Stra. 509; *Codrington* v. *Lloyd* (1839), 8 Ad. & El. 449; *Blanchenay* v. *Burt* (1843), 4 Q. B. 707; *Jones* v. *Williams* (1841), 8 M. & W. 349; *Prentice* v. *Harrison* (1843), 4 Q. B. 852; *Rankin* v. *De Medina* (1845), 1 C. B. 183; *Collett* v. *Foster* (1857), 2 H. & N. 356; *Williams* v. *Smith* (1863), 14 C. B. (N. S.) 596; *Smith* v. *Sydney* (1870), L. R. 5 Q. B. 203. If the writ be only erroneous, a party may justify under it after it has been set aside for an act done under it before it was set aside (*ibid.*; *Wilson* v. *Tummon* (1843), 6 Scott (N. R.), 894).

(*q*) *Codrington* v. *Lloyd*, *supra*; *Barker* v. *Braham* (1773), 3 Wils. 368; *Bates* v. *Pilling* (1826), 6 B. & C. 38.

(*r*) *Philips* v. *Biron*, *supra*; *Bates* v. *Pilling*, *supra*; *King* v. *Harrison* (1812), 15 East, 612; *Hooper* v. *Lane* (1847), 10 Q. B. 546, Ex. Ch.

(*s*) *Jeanes* v. *Wilkins* (1749), 1 Ves. Sen. 195; *Doe* d. *Batten* v. *Murless* (1817), 6 M. & S. 110; *Doe* d. *Emmett* v. *Thorn* (1813), 1 M. & S. 425; *Anon.* (1578), 3 Dyer, 363 a, pl. 24; *Hoe's Case* (1600), 5 Co. Rep. 89 b.

SECT. 16. Wrongful and Irregular Execution.

the owner may recover even against a *bonâ fide* purchaser for value (*a*).

67. The setting aside of a writ on the ground of irregularity does not prevent the plaintiff issuing and executing another writ (*b*). An application to set aside should be made as early as possible by summons (*c*), but in the Chancery Division it may be by motion upon notice. The objections intended to be taken must be stated in the summons or notice of motion (*d*).

SECT. 17.—*Restitution.*

Restitution.

68. Where a wrongful or irregular execution has been set aside, or where a judgment or order has been reversed after execution thereon has taken place, restitution will be made to the successful party (*e*). The order setting aside the execution or reversing the judgment or order should provide for this; and if it does, execution may issue upon it in the ordinary course (*f*). If the order does not so provide, another order may be made, or a writ called a writ of restitution be issued, commanding the judgment creditor to restore the property or pay over the proceeds of sale (*g*).

Part III.—Costs and Expenses of Execution.

Costs and expenses.

69. The sheriff and his officers are entitled to certain statutory fees and charges for enforcing writs of execution (*h*), and in every

(*a*) *Farrant* v. *Thompson* (1822), 2 Dow. & Ry. (K. B.) 1; *Tancred* v. *Allgood* (1859), 4 H. & N. 438.

(*b*) *M'Cornish* v. *Melton* (1834), 3 Dowl. 215; *Mackie* v. *Warren* (1828), 5 Bing. 176.

(*c*) *Austin* v. *Davey* (1844), 8 Jur, 1138; *Brooks* v. *Hodson* (1844), 2 Dow. & L. 256; *Jones* v. *Davis* (1847), 1 Saund. & C. 290, where the defendant alleged that he had not been served with process and knew nothing of the action.

(*d*) R. S. C., Ord. 70, r. 3; see also *Baillie* v. *Goodwin & Co.* (1886), 36 Ch. D. 604; and *Petty* v. *Daniel* (1886), 34 Ch. D. 172, 180.

(*e*) As to when the property taken will be restored *in specie*, and when merely the proceeds of sale will be paid to the judgment debtor, see the sections dealing with the different writs.

(*f*) The repayment of money recovered will be ordered with interest (*Rodger* v. *Comptoir d'Escompte de Paris* (1871), L. R. 3 P. C. 465; *Imperial Mercantile Credit Association* v. *Coleman* (1871), 40 L. J. (CH.) 262). In the case of reversal of judgment in ejectment the order should provide for ascertaining the profits of the land since judgment, and direct payment of the amount; see *Sympson* v. *Juxon* (1625), Cro. Jac. 699.

(*g*) *Doe* d. *Stephens* v. *Lord* (1837), 7 Ad. & El. 610; *Doe* d. *Pitcher* v. *Roe* (1841), 9 Dowl. 971. But the successful party cannot recover both the proceeds of sale and the property itself (*Doe* d. *Emmett* v. *Thorn* (1813), 1 M. & S. 425). The application is made to a master, either *ex parte* on affidavit for an order to issue the writ, or on summons to show cause why possession should not be restored (*Doe* d. *Lloyd* v. *Roe* (1842), 2 Dowl. (N. S.) 407). For the use of the writ of restitution as auxiliary to the writ of possession, see pp. 73, 78, *post*.

(*h*) As to these in detail, see title SHERIFFS AND BAILIFFS. A special bailiff (see p. 18, *ante*) is not bound by the statutory scale of fees and charges, and

case of execution the party entitled to execution may levy such fees and charges, and his own authorised costs of the execution, over and above the sum recovered under the judgment or order (*i*). The costs of the execution are costs of the writ of execution, and not of the action in which judgment was recovered or the order was made (*k*), and consequently they are not a debt due from the judgment debtor (*l*). It is doubtful whether the costs of a previous abortive execution can be included in the direction to levy (*m*), and although it appears clear that the costs of a writ of *elegit* are costs of execution which the execution creditor is entitled to levy, it appears to be doubtful whether he has any right at law to recover his costs of the inquisition, at any rate by levying them (*n*). It is said that on the *elegit* debtor seeking to recover the land the master may allow a reasonable sum for costs (*o*). The costs of a writ of possession may be ordered to be paid by the defendant, and execution can issue for them (*p*).

Sheriff's remuneration.

70. As to the remuneration of the sheriff, he is entitled to (1) poundage, and (2) certain fees and expenses allowed him by statute or order of court under statutory authority, but to no other remuneration or charge (*q*).

Poundage.

71. In executions for money, in order to entitle the sheriff to his poundage he must levy, that is seize, and get the money (*r*). If he does not seize he is not entitled to poundage, although the money be paid or tendered to him after the writ has been delivered to him for execution (*s*). If by compulsion of the writ after seizure the

may charge such fees as may be customary, and recover them by action from the person who actually appointed him, whether the judgment creditor or his solicitor (*Foster* v. *Blakelock* (1826), 5 B. & C. 328).

(*i*) R. S. C., Ord. 42, r. 15.

(*k*) *Salisbury* (*Marquis*) v. *Ray* (1860), 8 C. B. (N. S.) 193; *Armitage* v. *Jessop* (1866), L. R. 2 C. P. 12.

(*l*) *Re Long, Ex parte Cuddeford* (1888), 20 Q. B. D. 316, C. A.

(*m*) When *nulla bona* had been returned to a *fi. fa.* the direction of a subsequent *elegit* to levy the costs of the abortive writ was held good (*Bayley* v. *Potts* (1838), 8 Ad. & El. 272); but such costs could not be levied under a *ca. sa.* (*Earp* v. *Satchell* (1843), 4 Q. B. 121; *Salisbury* (*Marquis*) v. *Ray*, *supra*). The creditor cannot add the costs of an abortive execution to his debt so as to make up the amount required to support a bankruptcy petition (*Re Long, Ex parte Cuddeford*, *supra*).

(*n*) *Porter* v. *Wotton* (1884), 28 Sol. Jo. 548; compare *Mahon* v. *Miles* (1881), 30 W. R. 540.

(*o*) *Mahon* v. *Miles*, *supra*; see *Godfrey* v. *Watson* (1747), 3 Atk. 517.

(*p*) See *Dartford Brewery Co., Ltd.* v. *Moseley*, [1906] 1 K. B. 462, C. A. As to discretion as to costs, see Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5.

(*q*) *Slater* v. *Hames* (1841), 7 M. & W. 413; *Phillips* v. *Canterbury* (*Lord*) (1843), 11 M. & W. 619; *Re Woodham, Ex parte Conder* (1887), 20 Q. B. D. 40. For the rate of poundage and the authorised fees, see title SHERIFFS AND BAILIFFS. By the common law and the Statute of Westminster no sheriff could take reward to do his office (2 Co. Inst. 209; *Woodgate* v. *Knatchbull* (1787), 2 Term Rep. 148).

(*r*) *Mortimore* v. *Cragg* (1878), 3 C. P. D. 216, C. A. The sheriff cannot refuse to execute the writ until his fees are paid to him (*Hescott's Case* (1694), 1 Salk. 330).

(*s*) *Colls* v. *Coates* (1840), 11 Ad. & El. 826; *Nash* v. *Dickenson* (1867), L. R. 2 C. P. 252. After a tender to him the sheriff cannot sell, nor can he levy upon

PART III. Costs and Expenses of Execution.

sheriff gets the money even without sale he is entitled to poundage (*t*). He is also entitled to it if a compromise is effected by reason of the seizure (*u*). And as against the execution creditor, if the execution is withdrawn, satisfied or stopped, the sheriff is also entitled to poundage on the amount indorsed to be levied (*v*). But where the execution debtor becomes bankrupt after seizure but before sale, the sheriff is not entitled to poundage, since it is not a cost of execution which under the Bankruptcy Act is made a first charge on the goods seized (*w*). It may be that where the trustee in bankruptcy gets the benefit of the sale poundage may be charged as against him (*x*). If the judgment and writ of execution are set aside after seizure but before sale poundage is payable by the execution creditor (*y*).

The poundage is calculated upon the sum paid to the execution creditor, and not upon the amount realised by the sale (*z*). The sheriff, if he sells and pays to the landlord out of the proceeds the

the amount tendered (*Taylor* v. *Bekon* (1677), 2 Lev. 203; *Brun* v. *Hutchinson* (1844), 2 Dow. & L. 43).

(*t*) *R.* v. *Jetherell* (1757), Park. 177; *Bissicks* v. *Bath Colliery Co.* (1877), 2 Ex. D. 459; affirmed (1878), 3 Ex. D. 174, C. A., where the test was whether there had been a seizure in fact which procured the money to be paid; *Mortimore* v. *Cragg* (1878), 3 C. P. D. 216, C. A., overruling *Roe* v. *Hammond* (1877), 2 C. P. D. 300.

(*u*) *Alchin* v. *Wells* (1793), 5 Term Rep. 470; *R.* v. *Robinson* (1835), 2 Cr. M. & R. 334.

(*v*) Order, August, 1888, under the Sheriffs Act, 1887 (50 & 51 Vict. c. 55); *Madeley* v. *Greenwood* (1897), 42 Sol. Jo. 34.

(*w*) *Re Ludmore* (1884), 13 Q. B. D. 415; *Re Thomas, Ex parte Middlesex (Sheriff)*, [1899] 1 Q. B. 460, C. A.; *Madeley* v. *Greenwood, supra.* The Bankruptcy Act, 1890 (53 & 54 Vict c. 71), s. 11 (i.), enacts, "Where any goods of a debtor are taken in execution and before the sale thereof or the completion of the execution by the receipt or recovery of the full amount of the levy notice is served on the sheriff that a receiving order has been made against the debtor the sheriff shall on request deliver the goods and any money received in part satisfaction of the execution to the official receiver, but the costs of the execution shall be a first charge on the goods or money so delivered, and the official receiver or trustee may sell the goods or an adequate part thereof for the purpose of satisfying the charge." As to what are included in the term "costs of the execution" used in this section, see *Re Woodham, Ex parte Conder* (1887), 20 Q. B. D. 40; *Re Wells, Ex parte Kent (Sheriff)* (1893), 68 L. T. 231; *Re Harrison, Ex parte Essex (Sheriff)*, [1893] 2 Q. B. 111; *Re Thomas, Ex parte Middlesex (Sheriff)*, [1899] 1 Q. B. 460, C. A.; *Re Hurley* (1893), 10 Morr. 120; *Re Beeston*, [1899] 1 Q. B. 626, C. A.; *Re Rogers, Ex parte Sussex (Sheriff)* (1910), 130 L. T. Jo. 57. See also *Cohen* v. *De las Rivas, Ex parte Durham (Sheriff)* (1891), 64 L. T. 661 (seizure of ship, sale restrained, percentage for preparing for sale not allowed). The sheriff may have become entitled to fees other than poundage (*Re Craycraft, Ex parte Browning* (1878), 8 Ch. D. 596; *Re Priestly* (1889), 23 L. R. Ir. 536). As to the duty of the sheriff in respect of executions for over £20, see sub-s. (ii.) of the same section, and title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 274.

(*x*) *Clarke* v. *Nicholson* (1835), 1 Cr. M. & R. 724.

(*y*) *Miles* v. *Harris* (1862), 12 C. B. (N. S.) 550. But if set aside after sale, although the sheriff is bound to refund the proceeds of the execution he has as against the execution creditor earned his poundage (*Bullen* v. *Ansley* (1807), 8 Esp. 111).

(*z*) *Bridge* v. *Caye* (1605), Cro. Jac. 103; *Byrne* v. *Hutchinson* (1875), 9 I. R. C. L. 75; *Re Purcell* (1884), 13 L. R. Ir. 489. On a compromise with the Crown for penalties the sheriff was held entitled on the amount accepted by the Crown (*R.* v. *Robinson* (1835), 2 Cr. M. & R. 334). Poundage cannot be claimed for money which under the writ the sheriff had no authority to collect (*R.* v. *Villers* (1820), 8 Price, 587).

rent due, is entitled to poundage (*a*), but must hand the clear rent to the landlord (*b*).

Poundage under an *elegit* is payable when the sheriff has extended the lands (*c*), and where *elegits* are issued into different counties the sheriff who completes his levy is the sheriff entitled (*d*). The poundage in this case is calculated on the yearly value of the land extended (*e*).

Fees.

72. In addition to poundage the sheriff is entitled to certain fees, but can neither take nor receive anything over or above those fees and his poundage (*f*). Under a writ of *fieri facias* he is entitled to expenses of making inquiries, a fee or fees for seizure, mileage, man in possession, removal and warehousing goods and animals, advertising sale by auction, and commission to the auctioneer (*g*). These fees are regulated by an order made under the Sheriffs Act, 1887 (*h*), and are subject to taxation (*i*). Seizure is necessary to entitle the sheriff to the fees (*j*). It will be observed that the execution creditor is liable to the sheriff for the expenses, and the seizure and mileage, even if the execution results in nothing (*k*). The fees for seizure or mileage are not payable on a second writ where the sheriff is in possession under the first, unless seizure is made in a different place (*l*).

Possession money.

73. The right to the fee for possession arises where the sheriff takes possession, but is not payable if he is paid before seizure or after he has removed the goods (*m*). Possession money is allowed for such period only as is reasonably necessary for the purpose of selling (*n*).

(*a*) *Davies* v. *Edmonds* (1843), 12 M. & W. 31.

(*b*) *Gore* v. *Goston* (1725), 1 Stra. 643; see *Re Broster, Ex parte Pruddah*, [1897] 2 Q. B. 429.

(*c*) Therefore, where lands have been extended under one writ no poundage is payable on subsequent writs delivered to the sheriff (*Carter* v. *Hughes* (1858), 2 H. & N. 714).

(*d*) *R.* v. *Caldwell* (1793), 1 Anst. 279; *R.* v. *Fry* (1793), 2 Anst. 358; *R.* v. *Barber* (1796), 3 Anst. 717; *R.* v. *Bowles* (1810), Wight. 116; but see *R.* v. *Fry* (1793), 3 Anst. 718, n.

(*e*) *Nash* v. *Allen* (1843), 4 Q. B. 784.

(*f*) *R. aux. Parsons* v. *Fereday* (1817), 4 Price, 131; *Slater* v. *Hames* (1841), 7 M. & W. 413.

(*g*) All these fees may be levied although not indorsed on the writ (*Curtis* v. *Mayne* (1842), 2 Dowl. (N. S.) 37).

(*h*) For the table of fees, see title SHERIFFS AND BAILIFFS; Order as to Fees under the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), dated 31st August, 1888, Yearly Practice of the Supreme Court, 1911, p. 1753.

(*i*) The decision of the master is not appealable (*Townend* v. *Yorkshire (Sheriff)* (1890), 24 Q. B. D. 621), except in case of bankruptcy of the debtor; see *Re Beeston*, [1899] 1 Q. B. 626, C. A. But an appeal will lie against the master's refusal to tax (*Madeley* v. *Greenwood* (1897), 42 Sol. Jo. 34). The sheriff's costs on an interpleader summons are "costs of execution" within the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11 (1), but not the execution creditor's costs (*Re Rogers; Ex parte Sussex (Sheriff)* (1910), 130 L. T. Jo. 57).

(*j*) *Nash* v. *Dickenson* (1867), L. R. 2 C. P. 252.

(*k*) *Smith* v. *Broadbent & Co.*, [1892] 1 Q. B. 551.

(*l*) *Re Wells, Ex parte Kent (Sheriff)* (1893), 68 L. T. 231.

(*m*) *Howes* v. *Young, Howes* v. *Stone* (1876), 1 Ex. D. 146; *Re Grubb, Ex parte Sims* (1877), Ch. D. 521; affirmed, 5 Ch. D. 375, C. A. Only one man will be allowed (*Halliwell* v. *Heywood* (1862), 10 W. R. 780).

(*n*) *Davies* v. *Edmonds, supra; Re Finch, Ex parte Essex (Sheriff)* (1891), 65 L. T. 466.

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But as between execution creditor and debtor, where possession has been retained with their consent, possession money is chargeable for the whole time retained even though the judgment debtor ultimately after the expiration of three months from the expiration of twenty-one days after seizure becomes bankrupt (*o*). If, however, the debtor becomes bankrupt within the three months, only twenty-one days' possession money is allowed as against the goods as expenses of execution (*p*). Possession money is not payable after demand of possession by the official receiver of the execution debtor's estate (*q*). Where successive writs are delivered to the sheriff possession taken enures for the benefit of all the writs, and only one possession fee is chargeable (*a*).

Fees, how payable.

74. The fees other than poundage upon writs of extent, *elegit*, and others of the like nature are payable under statute (*b*). These fees are payable under writs of possession.

Recovery of fees by sheriff.

75. The sheriff can take his poundage and fees out of the property seized (*c*). The property seized must be that of the execution debtor (*d*). Moreover, the execution creditor is liable to him and may be sued for them when they have been earned (*e*). The sheriff can recover notwithstanding that the judgment and all subsequent proceedings have been set aside (*f*), though not for poundage where the setting aside has been after seizure but before sale (*g*). The sheriff cannot, where the execution creditor becomes disentitled to recover, sell the property seized for his possession money, fees, or expenses (*h*), nor can he for his poundage (*i*). The sheriff has no

(*o*) *Re Hurley* (1893), 5 R. 390; *Re Beeston*, [1899] 1 Q. B. 626.

(*p*) *Re English and Hayling, Ex parte Murray & Co.* [1903] 1 K. B. 680. To recover the possession money the remedy may be against the execution creditor (*ibid.*).

(*q*) *Jones* v. *Atherton* (1816), 7 Taunt. 56. After notice of a receiving order it ceases to be the duty of the sheriff to remain in possession, and he is therefore only entitled to possession money till that time (*Re Harrison, Ex parte Essex (Sheriff)*, [1893] 2 Q. B. 111). A high bailiff of the county court where goods taken in execution are claimed by a third party is entitled to possession money only up to the time when the claimant deposits in court the amount representing the value of the goods (*Newsum, Sons & Co., Ltd.* v. *James*, [1909] 2 K. B. 384).

(*a*) *Glasbrook* v. *David and Vaux*, [1905] 1 K. B. 615. Where the sheriff appropriates certain goods to answer each execution he may perhaps charge possession money on each (*Re Morgan, Ex parte Board of Trade*, [1904] 1 K. B. 68).

(*b*) Under order made under the Sheriffs Act, 1887 (50 & 51 Vict. c. 55); see table of fees, Yearly Practice of the Supreme Court, 1911, p. 1753; and title SHERIFFS AND BAILIFFS.

(*c*) See p. 35, *ante*.

(*d*) *Newman* v. *Merriman* (1872), 26 L. T. 397; see *Royle* v. *Busby* (1880), 6 Q. B. D. 171, C. A.

(*e*) *Stanton* v. *Suliard* (1599), Cro. Eliz. 654; *Tyson* v. *Paske* (1705), 2 Ld. Raym. 1212. The sheriff's appointment need not be proved in the action (*Bunbury* v. *Matthews* (1844), 1 Car. & Kir. 380). The action is *assumpsit* on an implied promise to pay, and therefore will not lie in respect of a seizure of goods other than the execution debtor's unless possession was retained at the execution creditor's express request (*Bilke* v. *Havelock* (1813), 3 Camp. 374; *Thomas* v. *Peek* (1888), 20 Q. B. D. 727).

(*f*) *Bullen* v. *Ansley* (1807), 6 Esp. 111; *Rawstorne* v. *Wilkinson* (1815), 4 M. & S. 256.

(*g*) *Miles* v. *Harris* (1862), 12 C. B. (N. S.) 550.

(*h*) *Sneary* v. *Abdy* (1876), 1 Ex. D. 299.

(*i*) *Goode* v. *Langley* (1827), 7 B. & C. 26.

right of action against the solicitor who puts him in motion by delivering the writ to him to be executed (*k*). The bailiff cannot maintain an action against the execution creditor for his fees (*l*), but where there is an express promise by the solicitor (*m*), or where the solicitor requests that a particular bailiff should be employed, that bailiff can sue him (*n*).

Where execution withdrawn.

76. Where the execution is withdrawn by the execution creditor the sheriff is entitled to the bailiff's fees and possession money (*o*).

Writ of delivery.

77. On a writ of delivery the plaintiff is entitled, either by the same or a separate writ of execution, to have made of the defendant's goods the damages and costs awarded and interest (*p*).

Overcharge.

78. An unintentional overcharge in his poundage or fees made by the sheriff's demanding more than is strictly due to him does not render him liable for extortion (*q*). If the sheriff levy in good faith more than is due to him he is not liable for extortion; the remedy against him in such a case is by summons to compel him to return or pay the overcharge.

Part IV.—Particular Forms of Execution.

SECT. 1.—*Writ of Fieri Facias.*

SUB-SECT. 1.—*In General.*

Writ of *fieri facias.*

79. The most usual method of execution is by writ of *fieri facias* (commonly called *fi. fa.*). Under this writ the goods and chattels of the debtor are seized and sold for the satisfaction of a judgment or order for the recovery or payment of a sum of money. The writ is addressed to the sheriff required to execute it, and commands him to seize and sell the judgment debtor's goods (*r*).

SUB-SECT. 2.—*When applicable.*

When applicable.

80. Whenever execution may issue (*a*) upon a judgment or order for the recovery or payment to a person of a sum of money

(*k*) *Maybery* v. *Mansfield* (1846), 9 Q. B. 754; *Seal* v. *Hudson* (1847), 4 Dow. & L. 760; *Cole* v. *Terry* (1861), 5 L. T. 347; *Royle* v. *Busby* (1880), 6 Q. B. D. 171, C. A.

(*l*) *Smith* v. *Broadbent & Co.*, [1892] 1 Q. B. 551.

(*m*) *Ormerod* v. *Foskett* (1796), Peake, Add. Cas. 77.

(*n*) *Foster* v. *Blakelock* (1826), 5 B. & C. 328; *Walbank* v. *Quarterman* (1846), 3 C. B. 94; *Maile* v. *Mann* (1848), 2 Exch. 608; see note (*e*), p. 36, *ante*.

(*o*) *Pirie* v. *Stewart*, [1899] 2 I. R. 546.

(*p*) R. S. C., Ord. 48, r. 2.

(*q*) *Lee* v. *Dangar, Grant & Co.*, [1892] 1 Q. B. 231; affirmed, [1892] 2 Q. B. 337, C. A.; *Shoppee* v. *Nathan & Co.*, [1892] 1 Q. B. 245; *Woolford's Estate* (*Trustee*) v. *Levy*, [1892] 1 Q. B. 772; see title SHERIFFS AND BAILIFFS.

(*r*) By R. S. C., Ord. 43, r. 1, writs of *fieri facias* and of *elegit* are to have the same force and effect as the like writs have heretofore had, and are to be executed in the same manner in which the like writs have heretofore been executed. For forms of writs of *fi. fa.*, see R. S. C., App. H, Nos. 1—2B.

(*a*) As to when execution may issue, see p. 4, *ante*.

SECT. 1. Writ of Fieri Facias.

or costs (*b*), the judgment creditor who desires to do so may immediately (*c*), and without previous demand (*d*), apply for the issue of one or more writs of *fieri facias*. Not more than one writ of *fieri facias* may, however, issue simultaneously (*e*) in the same county (*f*) for the recovery of the sum due, but one writ may issue for the sum due and a second for the costs, if such second writ be issued not less than eight days after the first (*g*). After the issue of a writ of *elegit*, and the extending of the lands of the judgment debtor thereunder, the judgment creditor can no longer issue a writ of *fieri facias* or other process (*h*).

SUB-SECT. 3.—*Issue and Delivery of the Writ.*

Issue and delivery.

81. The steps necessary to be taken on the issue of any writ of execution have been discussed (*i*). The writ is delivered to the under-sheriff or his deputy (*k*), who must indorse it with the time of such delivery (*l*), and who is not entitled to require any indorsement of the description or residence of the judgment debtor (*m*).

Delivery of several writs.

82. After the issue of several writs the judgment creditor can elect to deliver one or more of them to the sheriff or to the various sheriffs for execution (*n*), but in the latter case he must, to avoid an excessive levy, inform the sheriff of each county of the writ issued to the other (*o*).

(*b*) Not to enforce payment into a bank or into court (*Re Leeds Banking Co.* (1866), 1 Ch. App. 150).

(*c*) Without waiting even a reasonable time, *e.g.*, until return of post (*Smith* v. *Smith* (1874), L. R. 9 Exch. 121).

(*d*) *Kelly* v. *O'Beirne* (1867), 1 I. R. Eq. 540.

(*e*) That is to say, until the return of the first (*Chapman* v. *Bowlby* (1841), 8 M. & W. 249; see also *Forster* v. *Baker*, [1910] 2 K. B. 636); where a first writ is returned without the debt being satisfied, a second may at any time be issued (*Hopkins* v. *Adcock* (1772), Dick. 443); and see p. 25, *ante*.

(*f*) The writ may issue simultaneously with other writs of *fi. fa.* into other counties, or with any other writs of execution to which the judgment creditor is entitled. This was the case at common law (*Foster* v. *Jackson* (1614), Hob. 52, 57, 58; *Hodgkinson* v. *Whalley* (1831), 2 Cr. & J. 86; *Lewis* v. *Morris* (1834), 2 Cr. & M. 712); and as R. S. C., Ord. 42, r. 29, provides that nothing in that order should affect the order in which writs may be issued, there is nothing to prevent this being done at the present time; in fact the practice is frequently resorted to.

(*g*) R. S. C., Ord. 42, r. 18. The judgment creditor need not wait until after taxation to issue execution, but may have one writ for the debt and, when taxation is completed, a second for the costs (*Harris* v. *Jewell*, [1883] W. N. 216). The writ of execution for costs is issuable on production of the judgment and the taxing master's certificate, but not before the giving of the latter (*Re Crump, Ex parte Crump* (1891), 64 L. T. 799).

(*h*) *Crawley* v. *Lidgeat* (1614), Cro. Jac. 338; and see 11 Vin. Abr., tit. Execution, p. 39 (X. a), s. 14; and see, further, p. 62, *post*.

(*i*) See p. 16, *ante*.

(*k*) See p. 16, *ante*.

(*l*) See note (*f*), p. 19, *ante*.

(*m*) This indorsement is, however, usual. As to its effect, see p. 20, *ante*.

(*n*) *Re Davies, Ex parte Williams* (1872), 7 Ch. App. 314; *Lee* v. *Dangar, Grant & Co.*, [1892] 1 Q. B. 231; affirmed, [1892] 2 Q. B. 337, C. A.

(*o*) *Lee* v. *Dangar, Grant & Co.*, *supra*; and as to the effect of the issue of two

SUB-SECT. 4.—*Sheriff's Duties, Rights, and Liabilities under the Writ.*

SECT. 1. Writ of Fieri Facias.

Duties of sheriff.

83. Those duties and liabilities of the sheriff common to all forms of execution have already been dealt with (*p*). Under the writ of *fieri facias* it is his duty to seize and sell any goods which he has the power to seize (*q*), to an amount reasonably sufficient, but not more than sufficient (*r*), to satisfy the debt and his own expenses (*s*), and, after sale thereof and such satisfaction, to pay over any residue to the judgment debtor (*a*).

Where several judgment creditors.

84. Where several judgment creditors have delivered writs of *fieri facias* against the same debtor for execution, each of such writs binds the goods from the date of such delivery, and each judgment creditor is entitled, as against the others, to the benefit of such priority (*b*). It is, therefore, the duty of the sheriff to sell the goods under the writ first delivered to him (*c*). No separate seizure is necessary under the several writs, but the judgment creditors thereunder are entitled to payment out of any surplus proceeds of the sale in the order of such priority (*d*). If, however, the sheriff neglect to follow this order, and seize or sell under a writ which should have been postponed, the sale is valid, and the proceeds must be handed to the judgment creditor under whose writ the sale

writs in separate counties upon poundage, fees etc., see *ibid.*; and title SHERIFFS AND BAILIFFS.

(*p*) See p. 21, *ante*.

(*q*) As to what property is seizable, see p. 44, *post*.

(*r*) *Pitcher* v. *King* (1844), Dav. & Mer. 584; *Aldred* v. *Constable* (1844), 6 Q. B. 370; *Gawler* v. *Chaplin* (1848), 2 Exch. 503; nor must he sell further goods after the sum required has been realised at the sale (*Woodye* v. *Coles* (1595), Noy, 59; *Stead* v. *Gascoigne* (1818), 8 Taunt. 527; *Batchelor* v. *Vyse* (1834), 4 Moo. & S. 552; *Aldred* v *Constable*, *supra*).

(*s*) As to these, see pp. 32 *et seq.*, *ante*.

(*a*) At common law such surplus is recoverable after demand as money had and received to the judgment debtor's use; see *Rumsey* v. *Tufnell* (1824), 2 Bing. 255; *Underhill* v. *Wilson* (1830), 6 Bing. 697; *Harrison* v. *Paynter* (1840), 6 M. & W. 387.

(*b*) See p. 26, *ante*. There is to-day no doubt that as between several execution creditors the date of delivery is that which governs priority despite *dicta* to the effect that the statutes cited in note (*q*), p. 42, *post*, applied only as against purchasers; see the cases cited in note (*b*), p. 43, *post*. A delivery to the sheriff, with instructions to suspend seizure for a time (*Kempland* v. *Macauley* (1791), Peake, 59 [65]; *Hunt* v. *Hooper* (1844), 12 M. & W. 664), or until another execution be put in (*Pringle* v. *Isaac* (1822), 11 Price, 445), is not a delivery for execution, and writs of *fi. fa.* so delivered will be postponed.

(*c*) *Hutchinson* v. *Johnston* (1787), 1 Term Rep. 729; *Jones* v. *Atherton* (1816), 7 Taunt. 56; *Dennis* v. *Whetham* (1874), L. R. 9 Q. B. 345. A renewed writ is entitled to priority according to the time of its original delivery (R. S. C., Ord. 42, r. 20); see p. 24, *ante*. The sheriff must act upon his own responsibility, and cannot require of a solicitor delivering several writs on behalf of various judgment creditors any statement as to which is entitled to priority (*Ashworth* v. *Uxbridge* (*Earl*) (1842), 2 Dowl. (N. S.) 377).

(*d*) *Re Henderson*, *Ex parte Shaw*, [1884] W. N. 60, C. A.; *Jones* v. *Atherton* (1816), 7 Taunt. 56; but see *Smith* v. *Jackson* (1864), 4 F. & F. 352. The seizure on behalf of one enures to the benefit of all writs delivered before the sale; see *Dennis* v. *Whetham* (1874), L. R. 9 Q. B. 345; *Harrison* v. *Paynter* (1840), 6 M. & W. 387.

SECT. 1. Writ of Fieri Facias.

was made (*e*), but the sheriff remains liable to the creditor entitled to priority for damages due to his breach of duty (*f*).

Seizure.

85. It is the duty of the sheriff under a writ of *fieri facias* to ascertain where the goods of the judgment debtor are and to seize them. For this purpose he may legally enter the dwelling-house and premises of the judgment debtor (*g*), or of any stranger to whose premises the debtor's property has been removed (*h*). In so entering, however, he may not legally (save in an execution at the instance of the Crown (*i*)) break (*k*) into the dwelling-house (*l*), as distinguished from other premises (*m*), except in the case of the house of such stranger whereto the goods have been removed in order to avoid execution and demand has been made and refused (*n*). Where, however, the sheriff has obtained entry into the house, he is entitled to break open inner doors or trunks (*o*). If he be locked in, or unable to take out the goods, he may break out (*p*), and he may break in to rescue his bailiff (*q*), or to re-enter if forcibly ejected (*r*). The sheriff must not remain upon premises

(*e*) *Hutchinson* v. *Johnston* (1787), 1 Term Rep. 729; *Rybot* v. *Peckam* (1778), 1 Term Rep. 731, n.; and see also *Smallcomb* v. *Cross and Buckingham* (1697), 1 Ld. Raym. 251; *Payne* v. *Drewe* (1804), 4 East, 523, *per* Lord ELLENBOROUGH, C.J., at p. 538.

(*f*) The return of *nulla bona* to the judgment creditor having priority will be a false return (*Rybot* v. *Peckam, supra;* and see cases cited in note (*e*), *supra*).

(*g*) *Semayne's Case* (1604), 5 Co. Rep. 91 a; 1 Smith, L. C., 11th ed., p. 104; *Kerbey* v. *Denby* (1836), 1 M. & W. 336; or that of his personal representative, and whether goods of the judgment debtor be, in fact, found there or not (*Semayne's Case, supra;* and see *Cooke* v. *Birt* (1814), 5 Taunt. 765).

(*h*) *Biscop* v. *White* (1600), Cro. Eliz. 759; *Semayne's Case, supra.*

(*i*) *Semayne's Case, supra;* and see *Harvey* v. *Harvey* (1884), 26 Ch. D. 644 (a case under a writ of attachment).

(*k*) As to what constitutes a "breaking," see title DISTRESS, Vol. XI., pp. 163, 164, and the cases there cited; with the exception stated in note (*m*), *infra*, the rules relating to a sheriff and a distraining landlord are the same.

(*l*) *Semayne's Case, supra; Brunswick* (*Duke*) v. *Slowman* (1849), 8 C. B. 317; *Percival* v. *Stamp* (1853), 9 Exch. 167. Nor will the refusal of a demand to enter justify a breaking in under a *fi. fa.;* see *Semayne's Case, supra*, at p. 92 b.

(*m*) *I.e.*, barns or other buildings not connected with, or with the curtilage of, the dwelling-house (*Penton* v. *Brown* (1640), 1 Keb. 698; *Brown* v. *Glenn* (1851), 16 Q. B. 254; *Hobson* v. *Thelluson* (1867), L. R. 2 Q. B. 642; *Hodder* v. *Williams*, [1895] 2 Q. B. 663, C. A.). This distinction does not exist in cases of distress by a landlord, who may not break any outer door or building (*Brown* v. *Glenn, supra; American Concentrated Must Corporation* v. *Hendry* (1893), 62 L. J. (Q. B.) 388, C. A., *per* BOWEN, L.J., at p. 391; *Long* v. *Clarke*, [1894] 1 Q. B. 119, C. A.).

(*n*) *Semayne's Case, supra*, at p. 93 a; *Penton* v. *Brown, supra; Johnson* v. *Leigh* (1815), 1 Marsh. 565. As to how far residence by the judgment debtor makes a house his house, as distinguished from that of a stranger, see *Sheers* v. *Brooks* (1792), 2 Hy. Bl. 120; and see 1 Smith, L. C., 11th ed., p. 112.

(*o*) *R.* v. *Bird* (1680), 2 Show. 87; *Lee* v. *Gansel* (1774), 1 Cowp. 1, 6; as to the necessity for demand, see *Hutchison* v. *Birch* (1812), 4 Taunt. 619; *Ratcliffe* v. *Burton* (1802), 3 Bos. & P. 223.

(*p*) *White* v. *Whitshire* (1619), Palm. 52; and this without demand, if there be no one of whom to make demand (*Pugh* v. *Griffith* (1838), 7 Ad. & El. 827).

(*q*) *White* v. *Whitshire, supra.*

(*r*) *Aga Kurboolie Mahomed* v. *R.* (1843), 4 Moo. P. C. C. 239; *Eagleton* v. *Gutteridge* (1843), 11 M. & W. 465; *Bannister* v. *Hyde* (1860), 2 E. & E. 627.

for an unreasonable time (*s*). In the case of the premises being those of a stranger, the sheriff will enter subject to the further peril of being a trespasser if the debtor's goods be not found upon the premises (*t*).

The sheriff may not legally take goods from the person of the judgment debtor (*a*).

A sheriff who exceeds his powers in the matters of breaking in and entering or of taking from the person is guilty of a trespass *ab initio*, but his liability will not affect the validity of any execution made by him (*b*).

Death of judgment creditor or debtor.

86. The death of the judgment creditor after the date of the issue of the writ in no way affects the duties of the sheriff thereunder; he must proceed to seizure and sale notwithstanding the death (*c*).

Where the judgment debtor has died after the date of the judgment, but before that of the issue of the writ, the writ can only be issued by leave, and when so issued will direct the sheriff to levy the moneys out of the goods of the deceased (*d*). Such form of the writ is called a writ of *fieri facias de bonis testatoris* or *intestati* (*e*). Under it the assets of the deceased only, and not those of his personal representative, can be seized (*f*).

Where the judgment debtor has died after the date of the *teste* of the writ (whether before or after the delivery of the writ for execution), it is the duty of the sheriff to proceed under the writ, notwithstanding the death; and goods to which the binding efficacy of the writ has attached (*g*) must be followed, and seized thereunder, in the hands of the executors or of other persons (*h*).

(*s*) *Playfair* v. *Musgrove* (1845), 14 M. & W. 239; *Ash* v. *Dawnay* (1852), 8 Exch. 237; and see *Aikenhead* v. *Blades* (1813), 5 Taunt. 198.

(*t*) See *Semayne's Case* (1604), 5 Co. Rep. 91 a; 1 Smith, 11th ed., p. 104; in the case of a *ca. sa.*, *Johnson* v. *Leigh* (1815), 1 Marsh. 565; *Morrish* v. *Murrey* (1844), 13 M. & W. 52.

(*a*) See *Sunbolf* v. *Alford* (1838), 3 M. & W. 248, *per* Lord ABINGER, C.B., and PARKE, B., at pp. 253, 254; *Storey* v. *Robinson* (1795), 6 Term Rep. 138.

(*b*) *Semayne's Case*, *supra*, at p. 93 a; and see *Percival* v. *Stamp* (1853), 9 Exch. 167. Some doubt was, however, expressed by the court on this point in *Brunswick* (*Duke*) v. *Slowman* (1849), 8 C. B. 317; compare also *De Gondouin* v. *Lewis* (1839), 10 Ad. & El. 117, where, on an illegal seizure from the person by a customs officer of dutiable articles, no damages could be recovered for trespass to the goods.

(*c*) *Clerk* v. *Withers* (1704), 6 Mod. Rep. 290; or after the death of the person delivering it to him (*Ellis* v. *Griffith* (1846), 16 M. & W. 106; *Todd* v. *Wright* (1847), 16 L. J. (Q. B.) 311). As to where the creditor has died before the issue of the writ, see p. 9, *ante*.

(*d*) See p. 15, *ante*.

(*e*) For the subject of these writs generally, see *Wheatley* v. *Lane* (1669), 1 Wms. Saund. 216 a, and the notes thereto, at pp. 219, 219 h; and see title EXECUTORS AND ADMINISTRATORS, p. 332, *post*.

(*f*) See R. S. C., Ord. 42, r. 23, under which the court or a judge has power to decide any point arising as to the rights of the parties at the hearing of the application for leave to issue the writ.

(*g*) See p. 42, *post*.

(*h*) *Ranken* v. *Harwood* (1846), 10 Jur. 794; *Re Davies*, *Ex parte Williams* (1872), 7 Ch. App. 314, *per* MELLISH, L.J., at p. 317; and see also *Parkes* v. *Mosse* (1590), Cro. Eliz. 181; *Anon.* (1690), 2 Vent. 218; *Farrer* v. *Brooks* (1674), 1 Mod. Rep. 188; *Needham's Case* (1691), 12 Mod. Rep. 5; *Penoyer* v.

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Binding the property in the goods.

87. The writ is said to "bind" the property in the goods of the judgment debtor in the bailiwick. Where it is said that the goods, or the property therein, are "bound," what is meant is that the sheriff acquires a legal right to seize such goods. The ownership or general property, notwithstanding the binding effect of the writ, continues in the judgment debtor (*i*) until the sale, and he can legally, until seizure, deal with the goods himself (*k*) or, until sale, pass the property to others (*l*). Any transfer or assignment of the goods after the date at which the binding power of the writ operates (*m*) will (except in the cases of a purchaser in market overt or of a *bonâ fide* purchaser for value without notice (*n*)) be subject to the sheriff's right to follow up and seize the goods under the writ (*o*).

When writ takes effect.

88. At common law this binding power operated from the date of the issue of the writ (*p*). Now, however (*q*), a writ of *fieri facias*

Brace (1697), 1 Ld. Raym. 244; *Clerk* v. *Withers* (1704), 6 Mod. Rep. 290; *Wharam* v. *Broughton* (1748), 1 Ves. Sen. 180, *per* Lord HARDWICKE, L.C., at p. 183; *Payne* v. *Drewe* (1804), 4 East, 523, *per* Lord ELLENBOROUGH, C.J., at p. 537; compare, however, *Thoroughgood's Case* (1598), Noy, 73; *Ellis* v. *Griffith* (1846), 16 M. & W. 106, *per* PARKE, B., at p. 109. The right to follow the goods is not barred by the existence of an administration action (*Ranken* v. *Harwood* (1846), 10 Jur. 794). In the hands of the executors or others not entitled to the benefit of the later date fixed by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 26 (1), the goods can be seized if in the possession of the deceased (or, *semble*, of his personal representatives) at the date of the delivery of the writ (see note (*b*), p. 43, *post*). On a judgment and *fi. fa.* against a person as executor who is not executor, goods in his possession as agent for the executors are not seizable (*Sykes* v. *Sykes* (1870), 22 L. T. 236). For the purpose of ascertaining the relative priority of the death and the issue of the writ, the exact time, and not merely the day, will be considered (*Clinch* v. *Smith* (1840), 4 Jur. 86).

(*i*) *Payne* v. *Drewe* (1804), 4 East, 523; *Lucas* v. *Nockells* (1833), 10 Bing. 157, 182, H. L.; *Samuel* v. *Duke* (1838), 3 M. & W. 622; *Woodland* v. *Fuller* (1840), 11 Ad. & El. 859; *Re Clarke*, [1898] 1 Ch. 336, C. A., *per* LINDLEY, L.J., at p. 339; and see *Giles* v. *Grover* (1832), 1 Cl. & Fin. 72, H. L., *per* PATTESON, J., at p. 76.

(*k*) *E.g.*, by removing them out of the bailiwick of the sheriff to whom the writ has been issued; see *Re Davies, Ex parte Williams* (1872), 7 Ch. App. 314, *per* MELLISH, L.J., at p. 317.

(*l*) *Re Davies, Ex parte Williams, supra*; but compare *Gladstone* v. *Padwick* (1871), L. R. 6 Exch. 203, *per* MARTIN, B., at p. 210, where, however, it is probable that he was speaking of the inability to give a "title" good enough to oust the right of seizure; see note (*o*), *infra*. The decisions upon this point under the Statute of Frauds (29 Car. 2, c. 3), s. 15, and the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 1, must be taken as still subsisting, notwithstanding the slight change of language adopted in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 26. See note (*q*), *infra*.

(*m*) See *infra*.

(*n*) See *infra*.

(*o*) *Samuel* v. *Duke* (1838), 3 M. & W. 622, *per* PARKE, B., at p. 629 (the defendant may convey his property, but "the sheriff has a right to the execution notwithstanding the conveyance"); and see *Re Davies, Ex parte Williams, supra, per* MELLISH, L.J., at p. 317.

(*p*) See *Re Davies, Ex parte Williams, supra, per* MELLISH, L.J., at p. 317; *Farrer* v. *Brooks* (1674), 1 Mod. Rep. 188; *Boucher* v. *Wiseman* (1595), Cro. Eliz. 440.

(*q*) By the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 26 (1), repealing and

binds the property in the goods of the execution debtor only from the time when the writ is delivered to the sheriff (*r*) to be executed, and it is the sheriff's duty, without fee, to indorse upon it the exact date and hour of his receiving it (*a*). These statutory provisions are not for the protection of the debtor himself, or his executors or donees, the binding power of the writ still attaching, in their case, as from the date of the *teste* (*b*).

Exceptions.

89. To the above rules as to the binding power of the writ there are the following exceptions: (1) No goods will be bound as against the Crown (*c*); (2) no goods will be bound as against a purchaser in market overt (*d*); (3) no goods, falling within the definition thereof in the Sale of Goods Act, 1893 (*e*), will be bound as against a *bonâ fide* purchaser for value without notice of the delivery of a writ of execution (*f*); (4) no goods will be bound as against a purchaser from the sheriff under an execution which should have been postponed (*g*); and (5) no goods will be bound against a trustee

substantially reviving the provisions of the Statute of Frauds (29 Car. 2, c. 3), s. 15, previously repealed by the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 1.

(*r*) Which term includes all officers charged with the execution of any writ (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 26 (2)). As to the time where the writ is issued by way of warrant in a county court, see *Murgatroyd* v. *Wright*, [1907] 2 K. B. 333; *Birstall Candle Co.* v. *Daniels*, [1908] 2 K. B. 254.

(*a*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 26 (1).

(*b*) See *Horton* v. *Ruesby* (1686), Comb. 33; *Rawlinson* v. *Oriel* (1689), Comb. 144, *per* HOLT, C.J., and DOLBEN, J.; *Anon.* (1690), 2 Vent. 218; *Needham's Case* (1691), 12 Mod. Rep. 5; *Boucher* v. *Wiseman* (1595), Cro. Eliz. 440; *Finch* v. *Winchelsea* (*Earl*) (1720), 3 P. Wms. 399, n.; *Waghorne* v. *Langmead* (1796), 1 Bos. & P. 571; and see also *Hutchinson* v. *Johnston* (1787), 1 Term Rep. 729, *per* ASHURST, J., at p. 731, where he goes so far as to say that the Statute of Frauds (29 Car. 2, c. 3, s. 15), applied only as against purchasers under a previous sale in execution; this is not, however, consistent with the *dicta* of MELLISH, L.J., in *Re Davies, Ex parte Williams* (1872), 7 Ch. App. 314, at p. 327, where he says that the only surviving operation of the old common law rule is against the judgment debtor or his personal representatives; and see also *Smalcomb* v. *Buckingham* (1697), Carth. 419; *Guest* v. *Cowbridge Rail. Co.* (1868), L. R. 6 Eq. 619. There is no reason to consider that the law in this respect has been altered by the enactment of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71).

(*c*) *Jeanes* v. *Wilkins* (1749), 1 Ves. Sen. 195; *R.* v. *Wells and Alknutt* (1807), 16 East, 278, n., 282; *R.* v. *Sloper and Allen* (1818), 6 Price, 114.

(*d*) *Lowthal* v. *Tonkins* (1740), 2 Eq. Cas. Abr. 381; *Samuel* v. *Duke* (1838), 3 M. & W. 622; *Woodland* v. *Fuller* (1840), 11 Ad. & El. 859, *per* LITTLEDALE, PATTESON, and COLERIDGE, JJ.

(*e*) 56 & 57 Vict. c. 71, s. 62. This definition excludes things in action and money, which, however, not being seizable at common law under a *fi. fa.* at all, would not be "bound" by the writ; see p. 47, *post*; *Johnson* v. *Pickering*, [1908] 1 K. B. 1, C. A.

(*f*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 26 (1). This proviso repeals and replaces the provisions of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 1. As to what constitutes notice, see *Ehlers, Seel & Co.* v. *Kauffmann and Gates* (1884), 49 L. T. 806. It is not enough to know that a writ has been issued; there must be notice that it has been delivered for execution (*Gladstone* v. *Padwick* (1871), L. R. 6 Exch. 203, *per* BRAMWELL, B., at p. 211). The burden of proof of *bona fides* etc. lies upon the claimant purchaser (*Murgatroyd* v. *Wright*, [1907] 2 K. B. 333).

(*g*) As to the order in which the sheriff should execute writs, see p. 39, *ante*.

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in the bankruptcy of the judgment debtor unless the execution be completed by seizure and sale before the date of the receiving order (*h*).

SUB-SECT. 6.—*What can be seized under a Fieri Facias.*

(i.) *Nature of the Property seizable; Rights and Liabilities in respect of particular Kinds of Property.*

Nature of property seizable.

90. Goods and corporeal chattels, capable of sale, were alone seizable under a writ of *fieri facias* at common law (*i*).

Real property is not seizable, but chattels real and, as such, leasehold interests in land are affected by the writ (*k*). The term is bound by the issue of the writ in the same manner as were goods at common law (*l*). In the case of a term of years no seizure of the land by the sheriff is possible, as he has no right to possession (*m*), and the judgment debtor's term is sold by the sheriff and assigned under his seal of office without seizure or possession (*n*). The judgment debtor cannot be ejected by the sheriff (*o*), but the purchaser has a right of entry, upon which, if necessary, he must bring an action (*p*).

(*h*) The relative claims of the sheriff and the trustee in bankruptcy are regulated by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 45 (1), (2); see also title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 271 *et seq.* Note, however, that an order for the administration of the assets of a deceased person under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 125, does not produce a similar effect (*Hasluck* v. *Clark*, [1899] 1 Q. B. 699, C. A.); nor does the pendency of an administration action in Chancery (*Ranken* v. *Harwood* (1846), 10 Jur. 794).

(*i*) *Francis* v. *Nash* (1734), Lee *temp.* Hard. 53; *Wood* v. *Wood* (1843), 4 Q. B. 397, *per* Lord DENMAN, C.J., at p. 401; *Collingridge* v. *Paxton* (1851), 11 C. B. 683; as to the effects of this restriction, see, generally, *infra*.

(*k*) However short the term (*Sparrow* v. *Bristol* (*Earl*) (1813), 1 Marsh. 10; *Doe* d. *Westmoreland* v. *Smith* (1827), 1 Man. & Ry. (K. B.) 137). For example, where the execution debtor had entered under an agreement for a lease and paid rent (*Doe* d. *Westmoreland* v. *Smith*, *supra*; see also *Ronan* v. *King*, [1894] 2 I. R. 648, C. A.).

(*l*) See p. 42, *ante*. So that an assignment by the execution debtor subsequent to writ issued is of no effect against an assignment by the sheriff (*Burden* v. *Kennedy* (1757), 3 Atk. 739). But where the writ is returned without the term being sold an incumbrancer on the term will rank before a second *fi. fa.* issued after the return (*Williams* v. *Craddock* (1831), 4 Sim. 313). For the necessity for registration, see p. 70, *post*.

(*m*) *Coleman* v. *Rawlinson* (1858), 1 F. & F. 330.

(*n*) A deed is required under the Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 3 (*Coleman* v. *Rawlinson*, *supra*; *Harley* v. *Harley* (1860), 11 I. Ch. R. 451). The deed may be executed with the sheriff's seal by the undersheriff, and is good on ejectment without proof of his authority (*Doe* d. *James* v. *Brawn* (1821), 5 B. & Ald. 243; *Wood* v. *Rowcliffe* (1846), 6 Hare, 183, 186). The sale of the term is good, notwithstanding that the assignment was not executed until after the return of the writ (*Doe* d. *Stevens* v. *Donston* (1818), 1 B. & Ald. 230). The deed is, however, necessary for the vesting of the term in the purchaser (*Playfair* v. *Musgrove* (1845), 14 M. & W. 239), and entry and payment of the purchase price are not a substitute therefor (*Doe* d. *Hughes* v. *Jones* (1841), 1 Dowl. (N. S.) 352).

(*o*) *R.* v. *Deane* (1680), 2 Show. 85. The sheriff is liable to an action of trespass if he attempts it (*Playfair* v. *Musgrove*, *supra*).

(*p*) If he cannot enter peaceably (*Taylor* v. *Cole* (1789), 3 Term Rep. 292); explained in *Playfair* v. *Musgrove*, *supra*; *per* ROLFE, B., at p. 247; see also *Doe* d. *Batten* v. *Murless* (1817), 6 M. & S. 110; and Bac. Abr.,

A sale of a term of years by the sheriff is not an assignment of the term by the judgment debtor so as to cause a forfeiture of the lease operating in the event of assignment (*q*). If a forfeiture occur under a covenant expressly directed against an execution, this does not entitle a purchaser to recover money paid upon a contract to purchase "the debtor's interest (if any)" (*r*).

Chattels real.

91. Other chattels real, such as a rentcharge upon land for a term of years or a Crown annuity in the nature of such a rentcharge, can also be sold under a writ of *fieri facias* (*s*).

Fixtures.

92. The fact that no realty can be seized under the writ excludes from its operation such fixtures as would descend to the heir of the judgment debtor as distinguished from his personal representative (*t*); but such fixtures as can, between landlord and tenant, be severed by the tenant can be seized on a *fieri facias* against the tenant (*a*). Where the lease comprises tenants' fixtures, the sheriff may sever them and sell them separately (*b*).

Heirlooms.

93. Heirlooms, properly so called, are also excluded as being realty, while chattels held under trusts, which are commonly known as heirlooms, are also probably excluded (*c*).

Growing crops.

94. Growing crops which are *fructus industriales*, and which, as emblements, would pass to the personal representative, and not to the heir, of the judgment debtor, can be seized under a *fieri*

tit. "Execution," C, p. 388, where the proposition in the text is directly asserted.

(*q*) *Doe* d. *Mitchinson* v. *Carter* (1798), 8 Term Rep. 57.

(*r*) *Griffin* v. *Caddell* (1875), 9 I. R. C. L. 488; and as to the effect of such a contract, see also *Ronan* v. *King*, [1894] 2 I. R. 648. If the sheriff makes a misdescription of the term the contract will be avoided, but not if he also sells all the debtor's interest (see *Palmer's Case* (1597), 4 Co. Rep. 74 a). A sale of "the debtor's interest" does not pass a licence (*Re Gilmer* (1885), 17 L. R. Ir. 1).

(*s*) *Wotton* v. *Shirt* (1600), Cro. Eliz. 742; *York* v. *Twine* (1605), Cro. Jac. 78. It is stated in a note to *Johnson* v. *Streete* (1694), Comb. 290, 291, n., that an estate *pur autre vie* can also be sold under a *fi. fa.*; but such estate being a qualified freehold, it would seem that this view would be contrary to principle, and is not likely to be followed. The decision in the case does not involve the principle.

(*t*) *Winn* v. *Ingilby* (1822), 5 B. & Ald. 625. For example, a dyer's vat (*Day* v. *Bisbitch* (1595), Cro. Eliz. 374); millstones, tackling, and implements of a mill (*Place* v. *Fagg* (1829), 4 Man. & Ry. (K. B.) 277). As to what are such fixtures, see also *Bain* v. *Brand* (1876), 1 App. Cas. 762; and see title LANDLORD AND TENANT.

(*a*) *Poole's Case* (1703), 1 Salk. 368; *Minshall* v. *Lloyd* (1837), 2 M. & W. 450; *Richardson* v. *Ardley* (1869), 38 L. J. (CH.) 508; *Hawtry* v. *Butlin* (1873), L. R. 8 Q. B. 290; *Crossley Brothers, Ltd.* v. *Lee*, [1908] 1 K. B. 86, 90. In special circumstances, railway rails for mining purposes were held seizable (*Antrim* v. *Dobbs* (1891), 30 L. R. Ir. 424; *Beaufort* (*Duke*) v. *Bates* (1862), 3 De G. F. & J. 381, C. A.); see title LANDLORD AND TENANT. A wrongful severance by the tenant will not entitle the sheriff to seize under a *fi. fa.* against him (*Farrant* v. *Thompson* (1822), 5 B. & Ald. 826).

(*b*) *Barnard* v. *Leigh* (1815), 1 Stark. 43.

(*c*) As to heirlooms and *quasi*-heirlooms generally, see title REAL PROPERTY AND CHATTELS REAL; and for the question of equitable interests generally, see p. 49, *post*; and see *Foley* v. *Burnell* (1785), 4 Bro. Parl. Cas. 319, where it was decided that the property of chattels left as heirlooms having vested absolutely in the judgment debtor, they had become seizable.

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facias (*d*). Thus the sheriff can seize corn, or potatoes, but not trees, or grass, or apples upon trees (*e*). Having seized growing crops, the sheriff may cut, thresh, or dress them (*f*), and the usual time for the removal of goods by a purchaser from the sheriff will be extended until the ripening of the crops seized (*g*).

Where the judgment debtor is tenant of lands let to farm, there are certain statutory provisions for the benefit of the landlord, which may be summarised as follows (*h*). Where there exists any covenant, or written agreement, against the removal of manures or produce (*i*) from the land, between the tenant and landlord, the sheriff, if he have written notice thereof (*k*), cannot (except at the suit of the Crown) (*l*), remove such articles or sell them for removal (*m*).

Further, whether or not there be such covenants or agreements, any purchaser of the produce of such land (*n*) will be bound by the customary or contractual liabilities of the judgment debtor in respect of the taking of such crop (*o*), and the sheriff may sell to a purchaser under a written contract to abide by the terms of such covenants or agreements, or by the customary liabilities of the tenant (*p*).

(*d*) *Evans* v. *Roberts* (1826), 5 B. & C. 829; *Scorell* v. *Boxall* (1827), 1 Y. & J. 396; and see *Poole's Case* (1703), 1 Salk. 368; as to the subject of emblements generally, see title LANDLORD AND TENANT.

(*e*) See cases cited in previous note. Corn may be seized by the sheriff when green in the blade (*Gwilliam* v. *Barker* (1815), 1 Price, 274), though probably not if not appearing above ground (*Bagshaw* v. *Farnsworth* (1860), 2 L. T. 390). Where such corn is that of a tenant, note, however, the prior right of distress given to a landlord by the Landlord and Tenant Act, 1851 (14 & 15 Vict. c. 25), s. 2; and p. 54, *post;* note also, as to rye, clover etc., the effect of the Sale of Farming Stock Act, 1816 (56 Geo. 3, c. 50), s. 7; see title AGRICULTURE, Vol. I., p. 258.

(*f*) The expenses of cutting etc. may not, however, be deducted against the judgment creditor or the debtor without their authority (*Re Woodham, Ex parte Conder* (1887), 20 Q. B. D. 40); nor can they be allowed against the trustee in bankruptcy (*ibid.*).

(*g*) *Wharton* v. *Naylor* (1848), 12 Q. B. 673; see note (*b*), p. 53, *post.*

(*h*) Under the Sale of Farming Stock Act, 1816 (56 Geo. 3. c. 50); see also title AGRICULTURE, Vol. I., pp. 257, 258.

(*i*) As to the specific things covered by this term, see Sale of Farming Stock Act, 1816 (56 Geo. 3, c. 50), s. 1.

(*k*) The tenant must give notice to the sheriff of all such covenants or agreements of which he knows, and of his landlord's address, and forthwith on executing process the sheriff must give notice of his so doing to the landlord and his agent, waiting for a reply until the last day possible for the sale (Sale of Farming Stock Act, 1816 (56 Geo. 3, c. 50), s. 2).

(*l*) *R.* v. *Osbourne* (1818), 6 Price, 94.

(*m*) *Ibid.*, s. 1. He may, however, sell upon a written agreement by the purchaser to abide by the terms of such covenants etc. (*ibid.*, s. 3).

(*n*) Whether from the sheriff or the tenant (*Wilmot* v. *Rose* (1854), 3 E. & B. 563).

(*o*) Sale of Farming Stock Act, 1816 (56 Geo. 3, c. 50), s. 11.

(*p*) *Ibid.*, s. 3. Under any such contract the purchaser will have the facilities which the tenant would have had for consuming his crop (use of the barns, stables, and buildings etc. (*ibid.*, s. 3)), and will be protected from any distress by the landlord upon the crop or the objects so used in consuming it (*ibid.*, s. 6); and the sheriff will be protected against actions for trespass based upon the exercise of such facilities (*ibid.*, s. 10). The enforcement of contracts under this section (s. 3) is provided for (*ibid.*, s. 4). The sheriff must before sale make all inquiry as to the address of the landlord (*ibid.*, s. 5).

Under the same statute no clover or artificial grasses growing under standing corn can be seized or sold in execution (*q*), and the sheriff is not liable for any infraction of his duties thereunder relating to growing crops, unless such infraction be wilful (*r*).

Incorporeal property.

95. Incorporeal things are generally exempt from seizure under a *fieri facias*, and therefore, subject to the exception hereafter stated (*s*), the debts or other choses in action of the judgment debtor cannot be seized (*t*); nor can copyright (*a*), or stocks and shares (*b*).

Money.

96. At common law the requirement that the property seizable should be capable of sale (*c*), in addition to choses in action, also excluded from the operation of the writ money belonging to the debtor, but to these rules an important statutory exception was created by the provisions of the Judgments Act, 1838 (*d*).

Under these provisions the sheriff must seize the money or bank-notes (whether of the Bank of England or of any other bank), cand any cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money belonging to the judgment debtor (*e*). The money, to be seizable, must be in the possession or control of the debtor, and not be only payable to (*f*) or held in trust for him (*g*). A cheque payable to the debtor, and in the hands of the Paymaster-General of the High Court, but not delivered, cannot be seized (*h*). Securities for money do not include

(*q*) Sale of Farming Stock Act, 1816 (56 Geo. 3, c. 50), s. 7.

(*r*) *Ibid.*, s. 9. As to the subject of growing crops generally, see title AGRICULTURE, Vol. I., p. 257.

(*s*) See paragraph 96.

(*t*) *Willows* v. *Ball* (1806), 2 Bos. & P. (N. R.) 376; *Masters* v. *Stanley* (1840), 8 Dowl. 169; *Harrison* v. *Paynter* (1840), 6 M. & W. 387; nor is it material that the person owing the debt to the judgment debtor is the sheriff himself, holding moneys the result of an execution levied on the debtor's behalf (*Fieldhouse* v. *Croft* (1804), 4 East, 510; *Knight* v. *Criddle* (1807), 9 East, 48; *Padfield* v. *Brine* (1822), 3 Brod. & Bing. 294; *Harrison* v. *Paynter, supra*; *Winter* v. *Campbell* (1841), 9 Dowl. 914; *Brown* v. *Perrott* (1841), 4 Beav. 585; *France* v. *Campbell* (1842), 6 Jur. 105; *Wood* v. *Wood* (1843), 3 Gal. & Dav. 532; *Collingridge* v. *Paxton* (1851), 11 C. B. 683).

(*a*) See *Re Baldwin, Ex parte Foss* (1858), 2 De G. & J. 230, C. A., *per* KNIGHT BRUCE, L.J., at p. 237. The same reasoning would presumably apply to patents and trade marks.

(*b*) See p. 101, *post*.

(*c*) See p. 44, *ante*.

(*d*) 1 & 2 Vict. c. 110, s. 12.

(*e*) Bills of exchange were seizable at common law under an extent issued by the Crown (see *R.* v. *Hunter* (1817), 4 Price, 258; *R.* v. *Lambton* (1818), 5 Price, 428). One effect of this enactment is that an investment of money by a settlor on his children may be avoided as defeating or hindering creditors (*Barrack* v. *M'Culloch* (1856), 3 K. & J. 110).

(*f*) See cases cited in note (*t*), *supra*. Money in the hands of the debtor's agent for the express purpose of paying the debt to the sheriff cannot be seized (*Bell* v. *Hutchinson* (1844), 8 Jur. 895).

(*g*) *Robinson* v. *Peace* (1838), 7 Dowl. 93. As to where the money is in court in another action to the credit of the debtor, see *France* v. *Campbell, supra*; *Winter* v. *Campbell, supra*.

(*h*) *Courtoy* v. *Vincent* (1852), 15 Beav. 486, distinguishing *Watts* v. *Jefferyes* (1851), 3 Mac. & G. 422, where the cheque had been delivered out to an agent,

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policies of life insurance (*i*), nor, apparently, pawnbrokers' pledges (*k*).

On the seizure of money or bank-notes the sheriff's duty is to deliver them, or a sufficient part thereof, to the judgment creditor, and to pay over any surplus remaining after payment of his poundage and expenses to the judgment debtor (*l*). On the seizure of other securities, the sheriff's duty is to hold them as security for the amount due under the writ, and the sheriff has power (*m*) to sue (*n*) for the recovery of the sum secured when the time for payment shall arrive. Payment to the sheriff by a party liable on such security discharges him to the extent of his payment.

The sheriff must pay over the money recovered, or a sufficient part thereof, to the judgment creditor, and any surplus remaining, after payment of his poundage and expenses, to the judgment debtor (*o*).

Ships.

97. The sheriff may seize a ship (whether British or foreign (*p*)), or share of a ship (*q*). The seizure is effected by putting a man aboard with a warrant, which he should affix to the mast, but actual seizure of a British ship does not appear to be necessary (*r*). The sale of a British ship is completed by transfer of the ship, or share, by bill of sale (*s*).

Wearing apparel and tools.

98. The wearing apparel and bedding (*t*) of a judgment debtor or his family, and the tools and implements of his trade, not

but returned by him to the office. The procedure open in such cases to the execution creditor is by way of charging order (*Brereton* v. *Edwards* (1888), 21 Q. B. D. 488, 494, C. A.).

(*i*) *Alleyne* v. *Darcy* (1855), 5 I. Ch. R. 56; *Re Sargent's Trusts* (1879), 7 L. R. Ir. 66, not following the *dictum* in *Stokoe* v. *Cowan* (1861), 29 Beav. 637.

(*k*) *Re Rollason, Rollason* v. *Rollason, Halse's Claim* (1887), 34 Ch. D. 495.

(*l*) Until the money be paid over it is not the property of the judgment creditor (*France* v. *Campbell* (1842), 6 Jur. 105; *Winter* v. *Campbell* (1841), 9 Dowl. 914; *Wood* v. *Wood* (1843), 3 Gal. & Dav. 532; *Collingridge* v. *Paxton* (1851), 11 C. B. 683).

(*m*) He is not bound to sue unless the judgment creditor enters into a bond with two sureties to indemnify him from all costs and expenses, the expense of such bond to be deducted out of any money recovered (Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 12).

(*n*) In his own name (*ibid.*).

(*o*) Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 12. Property seizable under this section, not being seizable at common law, and not being "goods," under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 26 (1), 62, is not bound by the writ, and the sheriff therefore cannot seize money etc. which belonged to a judgment debtor who died pending the execution (*Johnson* v. *Pickering*, [1908] 1 K. B. 1, C. A.).

(*p*) *Union Bank of London* v. *Lenanton* (1878), 3 C. P. D. 243, C. A.

(*q*) *Chasteauneuf* v. *Capeyron* (1882), 7 App. Cas. 127, 135, P. C.; *Harley* v. *Harley* (1860), 11 I. Ch. R. 451; and see *Dickinson* v. *Kitchen* (1858), 8 E. & B. 789.

(*r*) See *Harley* v. *Harley*, *supra*.

(*s*) Under the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 2, 24; *Chasteauneuf* v. *Capeyron*, *supra*; *Harley* v. *Harley*, *supra*. In the latter case the sheriff got himself registered as transferee, and then transferred by bill of sale to a purchaser. There appears to be no reason why a share in a ship which is not at sea should not be sold by the sheriff in whose bailiwick the ship is registered. See also title SHIPPING AND NAVIGATION.

(*t*) Wearing apparel was seizable at common law, except while actually being worn. For the purposes of the Law of Distress Amendment Act, 1888 (51 & 52

exceeding in the whole the value of £5, are exempt from liability to seizure under any execution (*a*).

Soldier's pay and equipment.

Execution cannot be levied against the person, pay, arms, ammunition, equipments, or regimental necessaries of a soldier in the regular forces of the Crown (*b*).

Rolling stock.

The rolling stock and plant of railway companies is exempt from execution (*c*).

(ii.) *As regards the Title of the Judgment Debtor.*

Equitable interests.

99. The goods and chattels seized must be those of the judgment debtor, and not of any other person (*d*). In this connection it is necessary to consider first the position of equitable interests.

Under a *fieri facias* against a trustee chattels of the trust estate cannot be seized, and the trusts will be enforced against the sheriff seizing them (*e*). Under a *fieri facias* against the *cestui que trust* his equitable interests cannot be seized, and this rule excludes from the operation of the writ all equities of redemption (*f*). Where, however, the legal ownership vests in the judgment debtor by virtue of a rule

Vict. c. 21), "bedding" includes a bedstead (*Davis* v. *Harris*, [1900] 1 Q. B. 729).

(*a*) Small Debts Act, 1845 (8 & 9 Vict. c. 127), s. 8. This privilege of goods from execution is not affected by s. 44 (2) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), which reserves to the bankrupt his tools etc. to a value of £20 (*Re Dawson, Ex parte Dawson*, [1899] 2 Q. B. 54).

(*b*) Army Act, 1881 (44 & 45 Vict. c. 58), ss. 144, 145. This exemption extends to territorials on service, see title ROYAL FORCES.

(*c*) See p. 13, *ante*.

(*d*) As to the effect of this general proposition, see this sub-section generally.

(*e*) See *Burgh* v. *Francis* (1670), 1 Eq. Cas. Abr. 320, pl. 1; *Finch* v. *Winchelsea* (*Earl*) (1715), 1 P. Wms. 277; *Foley* v. *Burnell* (1783), 1 Bro. C C. 274, *per* Lord THURLOW, L.C., at p. 278; *Shingler* v. *Holt* (1861), 7 H. & N. 65; *Duncan* v. *Cashin* (1875), L. R. 10 C. P. 554, 558; *Wright* v. *Redgrave* (1879), 11 Ch. D. 24, C. A.

(*f*) As to the general rule that equities cannot to-day be seized under a *fi. fa.*, see *Scarlett* v. *Hanson* (1883), 12 Q. B. D. 213, C. A.; *Miller & Co.* v. *Solomon*, [1906] 2 K. B. 91, *per* KENNEDY, J., at p. 96. It was clear at common law prior to the Judicature Acts that a *fi. fa.* could not touch equities of redemption (even of leasehold land, and notwithstanding s. 10 of the Statute of Frauds (29 Car. 2, c. 3), the greater part of which was repealed by the Statute Law Revision and Civil Procedure Act, 1881 (44 & 45 Vict. c. 59)) (*Scott* v. *Scholey* (1807), 8 East, 467; *Lyster* v. *Dolland* (1792), 1 Ves. 431; *Re Newcastle* (*Duke*) (1869), L. R. 8 Eq. 700). Nor does a *fi. fa.* affect the equity of redemption of chattels legally mortgaged (*Ladbroke* v. *Crickett* (1788), 2 Term Rep. 649; *Dickinson* v. *Kitchen* (1858), 8 E. & B. 789 (ships); *Steward* v. *Lombe* (1820), 1 Brod. & Bing. 506; *Cross* v. *Barnes* (1877), 46 L. J. (Q. B.) 479 (fixtures comprised in a mortgage)). Under the previous divided system of the courts it was, however, the practice of the Court of Chancery where the judgment creditor had issued his writ of *fi. fa.* or *elegit*, but not before (*Angell* v. *Draper* (1686), 1 Vern. 399; *Shirley* v. *Watts* (1744), 3 Atk. 200; *Smith* v. *Hurst* (1845), 1 Coll. 705; *Partridge* v. *Foster* (1864), 34 Beav. 1), to grant an order authorising the sheriff to seize the chattels or land, or even to grant an order giving validity to acts done by him, when the only bar to his seizure at law was the fact that there was a trustee holding the legal ownership (*Pit* v. *Hunt* (1681), 2 Cas. in Ch. 73; *Anon.* (*temp.* Lord NOTTINGHAM, L.C.), cited in argument 1 P. Wms. 445; *Scott* v. *Scholey*, *supra*, *per* Lord ELLENBOROUGH, C.J., at p. 485; *Kirkby* v. *Dillon* (1824), Coop. Pr. Cas. 504; *Simpson* v. *Taylor* (1844), 7 I. Eq. R. 182; *Bennett* v. *Powell* (1855), 3 Drew. 326; *Gore* v. *Bowser* (1855), 3 Sm. & G. 1, 8; and see *Horsley* v. *Cox* (1869), 4 Ch. App. 92, *per* Lord HATHERLEY, L.C., at p. 100). The situation, therefore, to-day is, probably, that while without the leave of the court the sheriff would be a trespasser in seizing chattels vested in trustees,

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of equity, as under a contract for the sale to him of after-acquired property, the sheriff can seize the goods (*g*).

Goods in the hands of executors.

100. Where a *fieri facias* has issued against an executor or administrator of a deceased person in respect of a personal debt of such executor or administrator, the sheriff cannot take in execution goods and chattels of the deceased in his hands as such personal representative (*h*), unless, indeed, after such lapse of time and in such circumstances (*i*) as to lead to the conclusion that the creditors of the deceased have been satisfied (*k*).

Joint property.

101. Where the goods belong to the judgment debtor jointly, or in common, with some other person, they may be seized under a *fieri facias* unless the co-owner has become solely entitled by survival upon the death of the debtor before the delivery of the writ (*l*). The question of execution against partnership property has been discussed (*m*).

Interests of third parties in debtor's property.

102. Other instances in which the judgment debtor's interest in the goods is qualified by the rights of other persons may be considered under two heads.

First, the judgment debtor may be the owner of the goods, subject to the rights of other persons. In such cases the sheriff may seize the goods if the debtor is entitled to the possession of them, and may sell his rights therein, but not those of the other persons

such leave could be obtained; and where the trust was a bare trust in favour of the judgment debtor, the court would probably uphold the seizure, at any rate against any but a subsequent *bonâ fide* purchaser for value (see *Pit* v. *Hunt* (1681), 2 Cas. in Ch. 73; *Simpson* v. *Taylor* (1844), 7 I. Eq. R. 182). The similar procedure in aid of *elegit* has become practically obsolete by the extension by statute of the writ to equitable interests in land (Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 11), and the restriction of the writ to land (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 146); see p. 68, *post*.

(*g*) Under the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (11); *Interpleader Summons*, [1875] W. N. 203; for property to vest under this rule it must be taken into possession (*Holroyd* v. *Marshall* (1860), 2 De G. F. & J. 596), and, if it has so vested in another person, it cannot be seized under a *fi. fa.* against the judgment debtor (see [1876] W. N. 64). As to after-acquired property generally, see title SETTLEMENTS.

(*h*) *Farr* v. *Newman* (1792), 4 Term Rep. 621; *Gaskell* v. *Marshall and Poland* (1831), 1 Mood. & R. 132; *Fenwick* v. *Laycock* (1841), 1 Gal. & Dav. 532; *Re Morgan, Pillgrem* v. *Pillgrem* (1881), 18 Ch. D. 93, C. A. If, however, the goods be sold by the sheriff upon a *fi. fa.* against an executor who is also residuary legatee, and the purchaser (though having knowledge that the goods were assets of the testator) have no knowledge of outstanding debts or other reason why the sale of the goods is improper, the sale will be valid (*Nugent* v. *Gifford* (1738), 1 Atk. 463, explained in *Graham* v. *Drummond*, [1896] 1 Ch. 968, 974; *Mead* v. *Orrery (Lord)* (1745), 3 Atk. 235; *Taylor* v. *Hawkins* (1803), 8 Ves. 209; *Whale* v. *Booth* (1784), 4 Doug. (K. B.) 36; *Storry* v. *Walsh* (1854), 18 Beav. 559; see also *Graham* v. *Drummond*, *supra*, where the same rule is extended to equitable execution), though the executor could have challenged the sheriff's right to seize (*Fenwick* v. *Laycock*, *supra*). In an action for a false return of *nulla bona* it lies upon the sheriff to prove that the debtor's title was merely that of an executor (*Kelly* v. *Browne* (1883), 12 L. R. Ir. 348).

(*i*) *Re Morgan, Pillgrem* v. *Pillgrem*, *supra*. Lapse of time will not alone justify such seizure of goods if the executor is carrying out the trusts of the will; compare *Ray* v. *Ray* (1815), Coop. G. 264.

(*k*) See the cases cited in notes (*h*) and (*i*), *supra*.

(*l*) See 11 Vin. Abr., tit. Execution, 22 (S. a.), s. 3.

(*m*) See pp. 10 *et seq.*, *ante*.

entitled. Thus, goods subject to an innkeeper's lien (*n*), or to a lien for work done upon them (*o*), can be seized (*p*), but goods seized under a distress for rent (*q*), pledged, or hired out by the judgment debtor (*r*), or goods in bond upon which advances have been made, and which are held to the order of persons lending money to the judgment debtor (*s*), cannot be seized, unless, perhaps, the advances be paid off by the execution creditor (*t*).

Interests of debtor in property of third parties.

Secondly, the judgment debtor may have an interest in goods which are the property of some other person. In this case, if the judgment debtor be entitled to possession, and have a saleable interest in the goods, they may be seized by the sheriff, and such interest may be sold. Thus, if the goods are hired to the debtor for a term, his interest in them can be seized (*a*), though if, after notice from the owner, the sheriff purports to sell the absolute property in the goods, he may be liable for damages to the reversion (*b*). If the hiring is of such a nature that the debtor has no saleable interest (*c*), or if his interest has determined before seizure (*d*), or is determinable by the fact of seizure (*e*), the sheriff cannot legally seize. Similarly, where the judgment debtor has a right of sale, as in the case of a pledge to a pawnbroker, his interest can be seized (*f*); but where the debtor has a mere lien (*g*), or is merely in possession of the goods as borrower, or upon deposit, the goods cannot be seized (*h*).

(*n*) Subject to such lien; if the sheriff sells, he is liable for the amount of the lien (*Proctor* v. *Nicholson* (1835), 7 C. & P. 67).

(*o*) *Duncan* v. *Garratt* (1824), 1 C. & P. 169.

(*p*) The same rule would apply to goods lent to, or deposited with, other persons by the debtor.

(*q*) *Haythorn* v. *Bush* (1834), 2 Cr. & M. 689; *Reddell* v. *Stowey* (1841), 2 Mood. & R. 358. The landlord may waive his rights; see *Belcher* v. *Patten* (1848), 6 C. B. 608, *per* COLTMAN, J., at p. 618.

(*r*) *Garstin* v. *Asplin* (1815), 1 Madd. 150; *Balls* v. *Thick* (1845), 9 Jur. 304. Trover can be maintained by the pledgee against the sheriff seizing such goods (*Rogers* v. *Kennay* (1846), 9 Q. B. 592). It was suggested in *Rogers* v. *Kennay* (1846), as reported in 15 L. J. (Q. B.) 381, *per* Lord DENMAN, C.J., at p. 382, that although the goods cannot be seized, the right to redeem pledges can be disposed of by seizure and sale of the pawn-tickets; but see *Re Rollason, Rollason* v. *Rollason, Halse's Claim* (1887), 34 Ch. D. 495.

(*s*) *Young* v. *Lambert* (1870), L. R. 3 P. C. 142.

(*t*) *Scott* v. *Scholey* (1807), 8 East, 467.

(*a*) And the owner cannot maintain an action against the sheriff for selling them (*Gordon* v. *Harper* (1796), 7 Term Rep. 9; *Pain* v. *Whittaker* (1824), Ry. & M. 99; *Bradley* v. *Copley* (1845), 1 C. B. 685), because, a sale by the sheriff not being a sale in market overt, the owner is not damnified (*Tancred* v. *Allgood* (1859), 4 H. & N. 438).

(*b*) In trover (*Ward* v. *Macauley* (1791), 4 Term Rep. 489; *Dean* v. *Whittaker* (1824), 1 C. & P. 347; *Duffil* v. *Spottiswoode* (1828), 3 C. & P. 435; *Lancashire Waggon Co.* v. *Fitzhugh* (1861), 6 H. & N. 502).

(*c*) *Cooper* v. *Willomatt* (1845), 1 C. B. 672.

(*d*) *Manders* v. *Williams* (1849), 4 Exch. 339. No action by the bailor will lie when demand for possession is necessary before the bailor has a right to it (*Bradley* v. *Copley* (1845), 1 C. B. 685).

(*e*) *Jelks* v. *Hayward*, [1905] 2 K. B. 460.

(*f*) *Re Rollason, Rollason* v. *Rollason, Halse's Claim* (1887), 34 Ch. D. 495. The sheriff may retain on a *fi. fa.* against a pawnbroker moneys received for redemption of pledges (*Squire* v. *Huetson* (1841), 1 Q. B. 308).

(*g*) *Legg* v. *Evans* (1840), 6 M. & W. 36.

(*h*) Even if the judgment debtor so acts as to appear to be owner of the goods; see *Dawson* v. *Wood* (1810), 3 Taunt. 256.

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Claim of third party.

103. To ascertain what goods are the property of the judgment debtor and, as such, seizable under the writ of *fieri facias*, those cases must be considered in which a third party claims the goods adversely to the debtor. As a general rule it may be said that the sheriff may only seize and sell goods which could be recovered, or retained, by the judgment debtor in an action between him and such third party. To this rule there are, however, several exceptions.

In the first place, the sheriff may seize goods held by the third party under a conveyance by the judgment debtor executed in fraud of his creditors, although such conveyance would be valid against the judgment debtor (*i*). It may be noticed that the fact that the fraudulent conveyance is effected under the guise of a judgment and execution under a previous *fieri facias* does not affect its invalidity against the sheriff acting under a *bonâ fide* execution (*k*). It is the duty of the sheriff to make all reasonable inquiries to ascertain whether a conveyance relied on is fraudulent (*l*).

In the second place, the sheriff seizing under a *fieri facias* and the judgment creditor are not bound by estoppels affecting the judgment debtor; consequently, where the judgment debtor would be estopped from asserting his valid title to goods against the third person, the sheriff may nevertheless seize such goods (*m*); similarly the sheriff will not be precluded from raising defences against the third party which could not by reason of an estoppel be raised by the judgment debtor (*n*).

In the third place, the sheriff can seize goods where the judgment debtor would not be entitled to them as against a claimant, in those cases where the claimant's title is derived from the judgment debtor and where, as previously explained (*o*), the property in the goods is bound by the writ and the title of the claimant is later in date than the date of such binding.

Interpleader.

104. Where any person claims the property seized by the sheriff under a *fieri facias*, the sheriff is entitled to the benefit of interpleader process, and the court has power to order a sale, subject to the rights of the parties (*p*).

(*i*) For fraudulent and voidable conveyances, see title FRAUDULENT AND VOIDABLE CONVEYANCES. A sale for good consideration is not fraudulent merely because made with intent to defeat an expected execution creditor (*Wood* v. *Dixie* (1845), 7 Q. B. 892; *Holbird* v. *Anderson* (1793), 5 Term Rep. 235; see also *Darvill* v. *Terry* (1861), 6 H. & N. 807).

(*k*) *Bradley* v. *Wyndham* (1743), 1 Wils. 44; *West* v. *Skip* (1749), 1 Ves. Sen. 239, *per* Lord HARDWICKE, L.C., at p. 245; *Imray* v. *Magnay* (1843), 11 M. & W. 267.

(*l*) *Imray* v. *Magnay*, *supra*.

(*m*) *Richards* v. *Johnston* (1859), 4 H. & N. 660.

(*n*) For example, that an assignment by the judgment debtor to the claimant was void, as being an act of bankruptcy (*Chase* v. *Goble* (1841), 2 Man. & G. 930), or as being subsequent to another bill of sale (*Gadsden* v. *Barrow* (1854), 9 Exch. 514); see also *Edwards* v. *English* (1857), 7 E. & B. 564. The sheriff will not, however, be allowed to set up his own wrong-doing; for example, in an action by a landlord under the Landlord and Tenant Act, 1709 (8 Ann. c. 18), s. 1 (see p. 53, *post*), he will not be allowed to set up the title of a third person and allege that he had no right to seize at all; see *Duck* v. *Braddyll* (1824), M'Cle. 217.

(*o*) See p. 42, *ante*. This "binding" operates only against the property of the judgment debtor, and therefore, where the claimant's title is hostile to and independent of that of the judgment debtor, it will prevail against the sheriff.

(*p*) Under R. S. C., Ord. 57, r. 12; see title INTERPLEADER.

105. All questions arising upon a bankruptcy of the judgment debtor as to the relative rights of the judgment creditor and the trustee in bankruptcy, and the operation of an execution as an act of bankruptcy, and the special duties of the sheriff for the protection of trustees in bankruptcy, have been dealt with (*q*). Bankruptcy.

SUB-SECT. 7.—*How Payment of Rent and Taxes is provided for.*

106. When a landlord who has a claim for rent due against his tenant has distrained and is in possession of the goods, the sheriff will not be entitled to levy upon them in the event of a writ of *fieri facias* issuing against the tenant (*r*). Rent.

If, however, the landlord has not distrained before the sheriff seizes the goods, they are *in custodia legis* and exempt from distress by the landlord (*a*), and this exemption extends both while in the sheriff's hands, and also for a time after the sale reasonably sufficient for the removal of the goods by the purchaser (*b*).

Although the landlord is prevented by a seizure by the sheriff from distraining, he is, by statute (*c*), entitled under an execution in the High Court (*d*) to have the rent due, not exceeding one year's rent, paid to him before the removal of the goods from off the premises. This subject is dealt with at length elsewhere (*e*), but it may here be noticed that where a claim is made by the landlord the sheriff is liable to the landlord not only for removal of the goods without payment of the rent (*f*), but also for a negligent sale of the goods, whereby the landlord is damnified (*g*). After notice of a

(*q*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 23, 271, 274.

(*r*) *Ibid.*; see the cases cited in note (*q*), p. 51, *ante*.

(*a*) *Re Mackenzie, Ex parte Hertfordshire (Sheriff)*, [1899] 2 Q. B. 566, 573, C. A.; and see *Eaton* v. *Southby* (1738), Willes, 131; *Wharton* v. *Naylor* (1848), 12 Q. B. 673; except to the extent permitted by the Landlord and Tenant Act, 1851 (14 & 15 Vict. c. 25), s. 2; and title DISTRESS, Vol. XI., p. 179); and except also in the case of distress for rent due to the Crown (*R.* v. *Cotton* (1751), Park. 112).

(*b*) *Peacock* v. *Purvis* (1820), 2 Brod. & Bing. 362; *Wright* v. *Dewes* (1834), 1 Ad. & El. 641; *Re Benn Davis, Ex parte Pollen Trustees* (1885), 55 L. J. (Q. B.) 217. If the goods remain on the premises after a fraudulent and fictitious bill of sale made of them under an execution, the landlord can distrain them (*Smith* v. *Russell* (1811), 3 Taunt. 400); so, also, if the sheriff have abandoned (*Blades* v. *Arundale* (1813), 1 M. & S. 711); or if the execution creditor waive his rights (*Seven* v. *Mihill* (1756), 1 Keny. 370). Note also the restriction imposed by the Sale of Farming Stock Act, 1816 (56 Geo. 3, c. 50), s. 6, note (*p*), p. 46, *ante*.

(*c*) Landlord and Tenant Act, 1709 (8 Ann. c. 18), s. 1, as affected by the Execution Act, 1844 (7 & 8 Vict. c. 96), s. 67, in the case of tenancies shorter than one year.

(*d*) The Landlord and Tenant Act, 1709 (8 Ann. c. 18), does not apply to goods taken in execution under process issuing out of the county court; as to similar provisions applying to such process, see title COUNTY COURTS, Vol. VIII., pp. 563, 564.

(*e*) See title DISTRESS, Vol. XI., pp. 174 *et seq.*; *Cox* v. *Harper*, [1910] 1 Ch. 480; and title LANDLORD AND TENANT.

(*f*) In such an action the landlord need only prove the fact of occupation, and the burden of proving payment of the rent lies upon the sheriff (*Harrison* v. *Barry* (1819), 7 Price, 690).

(*g*) *Groombridge* v. *Fletcher* (1834), 2 Dowl. 353.

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claim by the landlord (*h*) the sheriff may seize sufficient goods to cover such claim, in addition to the debt due under the *fieri facias* (*i*).

By the terms of a later statute (*k*) the landlord is entitled, as an exception to the general rule that goods *in custodia legis* cannot be taken under a distress for rent, to take in distress growing crops of a farm tenant for rent accrued due since the date of the seizure by the sheriff (*l*).

Taxes.

107. Under the Taxes Management Act, 1880 (*m*), certain duties and taxes (*n*) payable by any person become in arrear, no goods or chattels belonging to such person are liable to be taken in execution, unless the judgment creditor, before the sale or removal of the goods, pays to the collector all arrears due at the time of seizing such goods, or payable for the year in which such seizure should be made, not exceeding in all such duties and taxes for one year. In case of refusal to pay such amount the collector is to distrain and sell (*o*) such goods, notwithstanding the seizure, in order to obtain payment of such amount, together with the costs of such distress and sale, and every collector so doing is indemnified (*p*).

SUB-SECT. 8.—*Seizure and its Effect.*

What constitutes seizure.

108. For an act of the sheriff or his bailiff to constitute a seizure of goods, it is not necessary that there should be any physical contact with the goods seized (*q*), nor does such contact necessarily amount to seizure (*r*). An entry upon the premises on which the goods are situate, together with an intimation of an intention to seize the goods, will amount to a valid seizure (*s*), even where the premises are extensive and the property seized widely scattered (*t*), but some act must be done sufficient to intimate to the judgment debtor or his servants that a seizure has been made (*a*), and it is not sufficient to enter upon the

(*h*) But not before such notice (*Re M'Carthy* (1881), 7 L. R. Ir. 473, C. A.).

(*i*) See title DISTRESS, Vol. XI., p. 178. The sheriff is not bound to notify the judgment debtor of the landlord's claim (*Davidson* v. *Allen* (1886), 20 L. R. Ir. 16; and see also *Cocker* v. *Musgrove* (1846), 9 Q. B. 223, where the same point was discussed, but not decided).

(*k*) Landlord and Tenant Act, 1851 (14 & 15 Vict. c. 25), s. 2.

(*l*) See title DISTRESS, Vol. XI., p. 179.

(*m*) 43 & 44 Vict. c. 19.

(*n*) These are the duties on inhabited houses, income tax, and the land tax (*ibid.*, s. 88 (1); and *ibid.*, s. 5 (1)).

(*o*) The distress and sale will be governed by the terms of s. 86 of the Act.

(*p*) *Ibid.*, s. 88. Where, under a local Act, the sheriff, on taking goods in execution, was required to pay the rates, an action was held to lie against him for paying the judgment creditor without so doing (*St. Marylebone Vestry* v. *London* (*Sheriff*), [1900] 1 Q. B. 111).

(*q*) *Bissicks* v. *Bath Colliery Co.* (1877), 2 Ex. D. 459; (1878), 3 Ex. D. 174, C. A.

(*r*) *Re Davies, Ex parte Williams* (1872), 7 Ch. App. 314; *Re Williams, Ex parte Jones* (1880), 42 L. T. 157.

(*s*) *Bissicks* v. *Bath Colliery Co., supra.* Similarly, a seizure of part of the goods in a house in the name of the whole is a good seizure (*Cole* v. *Davies* (1698), 1 Ld Raym. 724).

(*t*) *Gladstone* v. *Padwick* (1871), L. R. 6 Exch. 203.

(*a*) *Balls* v. *Thick* (1845), 9 Jur. 304, *per* Lord DENMAN, C.J., at p. 305.

premises and demand the debt (*b*). Any act which, if not done with the authority of the court, would amount to a trespass to goods will constitute a seizure of them when done under the writ (*c*). Whether or not there has been a seizure is a question of fact (*d*).

Effect of seizure.

109. By the seizure the goods are placed *in custodia legis*. The seizure is for the benefit of those who are by law entitled (*e*). The general property in the goods remains in the execution debtor (*f*), though what is called a special property in them vests in the sheriff, so that he can maintain actions for trespass or trover against any person who takes them away (*g*). No property in the goods passes to the execution creditor (*h*). By the seizure they are taken out of the order and disposition of the execution debtor (*i*), and out of his apparent possession (*k*). By the seizure before any act of bankruptcy the execution creditor becomes a secured creditor (*l*). The seizure is not a satisfaction of the execution creditor's debt, even to the value of the goods seized (*m*), but it is said to be *pro tanto* a discharge (*n*).

(*b*) Although made by the bailiff having the warrant in his hands (*Nash* v. *Dickenson* (1867), L. R. 2 C. P. 252).

(*c*) *Mortimore* v. *Cragg* (1878), 3 C. P. D. 216, C. A.; *Andrews* v. *Saunderson* (1857), 1 H. & N. 725.

(*d*) *Bird* v. *Bass* (1843), 6 Man. & G. 143; *Balls* v. *Thick* (1845), 9 Jur. 304; *Bower* v. *Hett*, [1895] 2 Q. B. 51.

(*e*) *Giles* v. *Grover* (1832), 1 Cl. & Fin. 72, 77, H. L.; *Union Bank of London* v. *Lenanton* (1878), 3 C. P. D. 243, C. A.

(*f*) *R.* v. *Bird* (1680), 2 Show. 87; *Giles* v. *Grover*, *supra*; *Woodland* v. *Fuller* (1840), 11 Ad. & El. 859; *Playfair* v. *Musgrove* (1845), 14 M. & W. 239; *Payne* v. *Drewe* (1804), 4 East, 523; *Samuel* v. *Duke* (1838), 3 M. & W. 622; *Union Bank of London* v. *Lenanton*, *supra*; *Re Clarke*, [1898] 1 Ch. 336, 339, C. A.

(*g*) *Wilbraham* v. *Snow* (1670), 2 Wms. Saund. 47 a; *Giles* v. *Grover* (1832), 1 Cl. & Fin. 72, H. L.; but not unless there has been actual seizure (*Blades* v. *Arundale* (1813), 1 M. & S. 711). The judgment debtor is not guilty of larceny in taking goods seized by the sheriff (*R.* v. *Knight* (1908), 1 Cr. App. Rep. 186).

(*h*) *Giles* v. *Grover*, *supra*, at p. 97.

(*i*) *Fletcher* v. *Manning* (1844), 12 M. & W. 571; *Re Baldwin*, *Ex parte Foss* (1858), 2 De G. & J. 230, C. A.

(*k*) *Re Brenner*, *Ex parte Saffery* (1881), 16 Ch. D. 668, C. A., not following *Re Cole*, *Ex parte Mutton* (1872), L. R. 14 Eq. 178. The effect of this is to prefer a claim under a prior (absolute) bill of sale, although not registered, to that of a trustee in bankruptcy subsequent to the execution (*Re Eales*, *Ex parte Steel* (1905), 54 W. R. 202).

(*l*) *Slater* v. *Pinder* (1872), L. R. 7 Exch. 95, Ex. Ch.; *Re Clarke*, [1898] 1 Ch. 336, C. A. The execution is not made invalid by the bankruptcy, but the execution creditor is in certain circumstances deprived of the fruits of the execution (*Re Pearce*, *Ex parte Crossthwaite* (1885), 14 Q. B. D. 966; *Figg* v. *Moore Brothers*, [1894] 2 Q. B. 690); see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 272.

(*m*) *Lee* v. *Dangar*, *Grant & Co.*, [1892] 1 Q. B. 231, affirmed, [1892] 2 Q B 337, C. A. The expression "satisfaction" has been used in the cases incautiously when it was immaterial to consider the distinction between seizing and selling by the sheriff (*ibid.*, at p. 350); see *Clerk* v. *Withers* (1704), 2 Ld. Raym. 1072; *Lansdowne* v. *Connor* (1889), 24 L. R. Ir. 50).

(*n*) *Re a Debtor*, *Ex parte Smith*, [1902] 2 K. B. 260, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 265.

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Retaining possession after seizure.

110. After the seizure under the writ it is the sheriff's duty to retain possession until sale (*o*). If he abandons the goods, they are no longer subject to the writ (*p*), and he will be liable to the judgment creditor for damages (*q*). He may, however, after withdrawal, re-enter, if directed to do so by the judgment creditor (*r*).

A mere absence, to be distinguished from an abandonment, must be a relinquishment of possession caused by some urgent necessity (*s*), and the question as to whether an abandonment has taken place is a question of fact, in determining which any absence, unless satisfactorily explained, will be considered an abandonment (*t*).

Payment to sheriff of amount to be levied.

111. The sheriff has authority from the judgment creditor to receive the amount to be levied (*a*), and can give a discharge (*b*). If payment or tender (*c*) be made, he must withdraw from possession (*d*), and if no payment be made, he must, after the seizure, proceed at once to prepare for sale (*e*).

Sale of goods.

112. The sheriff is not entitled to hand over goods seized under a writ of *fieri facias* to the judgment creditor in satisfaction of the debt (*f*), although at a sale the judgment creditor (*g*) or judgment debtor may be purchasers of the goods (*h*). It is the duty of the sheriff, within a reasonable time after the seizure, to sell the

(*o*) *Ackland* v. *Paynter* (1820), 8 Price, 95.

(*p*) *Blades* v. *Arundale* (1813), 1 M. & S. 711; *Crowder* v. *Long* (1828), 8 B. & C. 598.

(*q*) For other persons will be able to obtain priority by distress or execution (*Crowder* v. *Long*, *supra*; *Shaw* v. *Kirby* (1888), 52 J. P. 182). The sheriff must, however, abandon possession where he has received a claim for rent under the Landlord and Tenant Act, 1709 (8 Ann. c. 18), s. 1 (see p. 53, *ante*), and the judgment creditor does not pay off such claim (*Foster* v. *Hilton* (1831), 1 Dowl. 35).

(*r*) *Miller & Co.* v. *Solomon*, [1906] 2 K. B. 91; but not unless so directed (*Shaw* v. *Kirby*, *supra*).

(*s*) *Ackland* v. *Paynter*, *supra*, *per* GRAHAM, B., at p. 101.

(*t*) *Ibid.*, *per* RICHARDS, C.B., at p. 100. A withdrawal so as to facilitate a sale of a business to a limited company is an abandonment (*Bagshawes, Ltd.* v. *Deacon*, [1898] 2 Q. B. 173, C. A.), nor will the fact that the officer, after seizure and before departure from the premises, has left his warrant in a drawer in the debtor's house, prevent his absence from being an abandonment (*Blades* v. *Arundale*, *supra*).

(*a*) See *Rook* v. *Wilmot* (1590), Cro. Eliz. 209; *Taylor* v. *Baker* (1677), Freem. (K. B.) 453.

(*b*) *Gregory* v. *Slowman* (1852), 1 E. & B. 360.

(*c*) By the judgment debtor or another person (*R.* v. *Bird* (1680), 2 Show. 87).

(*d*) And the execution creditor, if satisfied, should direct him to withdraw, but will not be liable for not so doing except upon proof of malice (*Phillips* v. *General Omnibus Co.* (1880), 50 L. J. (Q. B.) 112).

(*e*) *Re Crook, Ex parte Hampshire* (*Sheriff*) (1894), 10 R. 394, where it was also decided that no valid sale can be made before seizure. No appraisement before sale is necessary (*Bealy* v. *Sampson* (1689), 2 Vent. 93).

(*f*) *Thomson* v. *Clerk* (1596), Cro. Eliz. 504.

(*g*) *A.-G.* v. *Fort* (1804), 8 Price, 364, n.; *Stratford* v. *Twynam* (1822), Jac. 418; *Cookson* v. *Fryer* (1858), 1 F. & F. 328; *Re Rogers, Ex parte Villars* (1874), 9 Ch. App. 432, 437.

(*h*) The sheriff may not himself keep the goods and pay the amount of the levy (*Waller* v. *Weedale* (1604), Noy, 107).

goods (*i*) for a reasonable price (*k*), and it is also his duty not so to conduct the sale as to prevent them fetching such a price as might have been obtained (*l*).

The sale must, where goods are sold under an execution for a sum exceeding £20 (including legal incidental expenses), unless under order to the contrary from the court issuing the process (*m*), be made by public auction publicly advertised on and during three days next before the sale (*n*). If, however, the sale is made otherwise than in fulfilment of these requirements, its validity is not affected until set aside by the court (*o*).

After the sale it was formerly usual for the sheriff to give to the purchaser a bill of sale of the property purchased, but such document is not necessary to the validity of the sale (*p*), and is not now given. The usual receipt enumerating the goods sold need not be registered as a bill of sale (*q*).

Title acquired by purchaser.

113. A sale by the sheriff is not a sale in market overt, and the purchaser acquires thereby only what the judgment creditor has a right to sell, namely, the precise interest, and no more, which the judgment debtor possessed in the goods, subject to all charges and incumbrances, legal and equitable, to which they were subject in the hands of the debtor (*r*). No warranty of title is implied in a sale by the sheriff (*s*). A *bonâ fide* purchaser from the sheriff is entitled to

(*i*) And it is no excuse that he considered the delay beneficial to all parties (*Re Essex (Sheriff)*, *Terrell* v. *Fisher* (1862), 10 W. R. 796). A week's delay to verify a notice of an act of bankruptcy has been held to be unreasonably long (*Ayshford* v. *Murray* (1870), 23 L. T. 470), but no precise time is specified. As to process issuing from inferior courts, see p. 128, *post*. Any unreasonable delay will, on proof of damage, but not otherwise (*Re Essex (Sheriff)*, *Terrell* v. *Fisher*, *supra*), render the sheriff liable to the judgment creditor (*Aireton* v. *Davis* (1833), 3 Moo. & S. 138; *Ayshford* v. *Murray*, *supra*; see also *Mullett* v. *Challis* (1851), 16 Q. B. 239), and to the judgment debtor (*Carlile* v. *Parkins* (1822), 3 Stark. 163; *Ash* v. *Dawnay* (1852), 8 Exch. 237). The sheriff need not accept an indemnity offered by a claimant for not selling a chattel having special value, but may proceed to sell notwithstanding such offer (*Harrison* v. *Forster* (1836), 4 Dowl. 558).

(*k*) It is not sufficient that he sells them to the highest bidder greatly under their value (*Keightley* v. *Birch* (1814), 3 Camp. 521, 524).

(*l*) For example, by improper lotting of the goods (*Wright* v. *Child* (1866), L. R. 1 Exch. 358); and a clearly negligent sale has been set aside by the court in Ireland (*Edge* v. *Kavanagh* (1888), 24 L. R. Ir. 1).

(*m*) Such an order has been made on an *ex parte* application of the judgment creditor (*Hunt* v. *Fensham* (1884), 12 Q. B. D. 162). The application can be made at chambers (*Hunt* v. *Clifford*, [1884] W. N. 86), and is usually made by summons, to which the sheriff must be a party.

(*n*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 145. He may proceed to advertise immediately without waiting (*Re Crook*, *Ex parte Hampshire (Sheriff)*, (1894), 10 R. 394).

(*o*) *Crawshay* v. *Harrison*, [1894] 1 Q. B. 79.

(*p*) *Hernaman* v. *Bowker* (1856), 11 Exch. 760. As to ships, see p. 48, *ante*.

(*q*) For the property passes by the sale itself (*Marsden* v. *Meadows* (1881), 7 Q. B. D. 80, C. A., following *Woodgate* v. *Godfrey* (1879), 5 Ex. D. 24, C. A., decided under an earlier statute); see also title BILLS OF SALE, Vol. III., p. 9, note (*g*).

(*r*) *Wickham* v. *New Brunswick and Canada Rail. Co.* (1865), L. R. 1 P. C. 64, 75, 76; *De Wolf* v. *Pitcairn* (1869), 17 W. R. 914; *Crane & Sons* v. *Ormerod*, [1903] 2 K. B. 37.

(*s*) And this exception to the usual rule extends to a sale of his bargain by

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the same protection as any other *bonâ fide* purchaser against other executions which should have had priority (*a*), and that even if the writ under which the sale at which he purchased is void, as being under a fraudulent judgment (*b*).

SUB-SECT. 9.—*Return to the Writ and Remedies for the Amount levied.*

Returns to the writ.

114. The ordinary forms of return specially applicable to the writ of *fieri facias* are three in number: (1) *fieri feci*; (2) *nullâ bona*; (3) *the goods and chattels seized remain in my hands unsold for want of buyers.*

Return of *fieri feci.*

115. The return of *fieri feci* is applicable where the sheriff has seized and sold goods sufficient in value to satisfy the amount to be levied under the *fieri facias.* It states that the sheriff has caused to be made the moneys and interest named in the writ or the amount levied.

Return of *nulla bona.*

116. The return of *nulla bona* is applicable where there are no goods of the judgment debtor in the sheriff's bailiwick (*c*), the proceeds of which are available to satisfy the writ (*d*). It is therefore a good return if there are no goods at all, or, if the proceeds of such goods as have been sold have not proved more than sufficient to satisfy the costs of the levy (*e*), and any claims prior to those of the writ, such as other prior writs (*f*), executions on behalf of the Crown (*g*), or landlord's claims under the Act of 1709 (*h*). It states that the judgment debtor has no goods or chattels whereof the moneys and interest named in the writ, or any part thereof, can be made.

Where no reasonable offer made.

117. The return that *the goods and chattels seized remain in my hands unsold for want of buyers* is applicable not only to the case in

the purchaser to another person present at the auction (*Chapman* v. *Speller* (1850), 14 Q. B. 621).

(*a*) Under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 26 (1); see note (*f*), p. 43, *ante.*

(*b*) *Imray* v. *Magnay* (1843), 11 M. & W. 267; but not, of course, if he knew of or was party to the invalidity of the execution (*Bessey* v. *Windham* (1844), 6 Q. B. 166; disapproved, upon another point, in *White* v. *Morris* (1852) 11 C. B. 1015; *Christopherson* v. *Burton* (1848), 3 Exch. 160; *Ogden* v. *Hesketh* (1849), 2 Car. & Kir. 772; *Shattock* v. *Carden* (1851), 6 Exch. 725).

(*c*) That is to say, goods seizable under the writ; and therefore where the judgment debtor's title to goods is void (*Crosley* v. *Arkwright* (1788), 2 Term Rep. 603), or merely equitable (*Scarlett* v. *Hanson* (1883), 12 Q. B. D. 213, C. A.), or has passed to a trustee in bankruptcy (*Smallcombe* v. *Olivier* (1844), 13 M. & W. 77), the return is good.

(*d*) *Milner* v. *Rawlings* (1867), L. R. 2 Exch. 249, *per* BRAMWELL, B., at p. 252. Thus the return is good to a writ delivered with the intention of defrauding creditors, whether there are goods available or not (*Shattock* v. *Carden*, *supra*).

(*e*) *Dennis* v. *Whetham* (1874), L. R. 9 Q. B. 345, *per* ARCHIBALD, J., at p. 349.

(*f*) *Ibid.*, *per* BLACKBURN, J., at p. 348. But where the sheriff has sold under the writ he must return *fieri feci*, even though he should have sold under another prior writ, and a return of *nulla bona* is bad (*Rybot* v. *Peckham* (1778), cited 1 Term Rep. 731, n.).

(*g*) *Grove* v. *Aldridge* (1832), 9 Bing. 428.

(*h*) Landlord and Tenant Act, 1709 (8 Ann. c. 18), s. 1; see p. 53, *ante*; *Wintle* v. *Freeman* (1841), 1 Gal. & Dav. 93; *Heenan* v. *Evans* (1841), 1 Dowl. (N. S.) 204.

which no bid is made for the goods (*i*), but also where no offer is made of a sum reasonably approaching their value (*k*). The value of the goods should be stated in the return (*l*).

Where goods have realised insufficient to discharge sum due.

118. Where the goods seized have realised insufficient to discharge the whole sum due, and either there are no further goods, or such goods as there are have been seized and remain unsold in the sheriff's hands, the return will be as to part a return of *fieri feci*, and as to the residue a return of *nulla bona*, or that the goods remain unsold, as the case may be. It is not necessary for the return to specify the particular goods taken (*m*).

Other forms of return.

119. Other forms of return are sometimes applicable. Thus, where the execution is stayed by order (*n*), or by direction of the judgment creditor's solicitor (*o*), or where the judgment debtor is a beneficed clerk and has no goods or chattels in the bailiwick (*p*), these facts should be stated in the return. The returns of *mandavi ballivo* (*q*) and of a *devastavit* (to a writ of *fieri facias de bonis testatoris* (*a*)) are also applicable.

The return must not fail to state whether the debtor has goods within the bailiwick (*b*). Where the writ to which a return has to be made is one of several writs, the sheriff should return specifically whether he has seized under the writ, and the form applicable to such a return is, after a recital of all the writs delivered, that he has seized "by virtue of the said several writs, and according to the priority thereof" (*c*).

Recovery from sheriff of sum retained.

120. Where a return of *fieri feci* has been made as to the whole or a part of the moneys to be levied, the sum returned thereby as made is recoverable from the sheriff by the judgment creditor; as is also the amount in fact levied, whether any actual return has been made or not (*d*). An action lies for the amount levied or returned as levied (*e*), as for money had and received (*f*); or a

(*i*) *Barnard* v. *Leigh* (1815), 1 Stark. 43.

(*k*) If he sell the goods at an excessively low price he will be liable at the suit of the judgment creditor for damages (*Keightley* v. *Birch* (1814), 3 Camp. 521).

(*l*) *Barton* v. *Gill* (1844), 1 Dow. & L. 593; *Wintle* v. *Chetwynd* (*Lord*) (1839), 7 Dowl. 554. The omission to state the value is a mere irregularity (*Chambers* v. *Coleman* (1841), 9 Dowl. 588). The effect of the return of value is to bind the sheriff in case of a rescue (*Clerk* v. *Withers* (1704), 6 Mod. Rep. 296).

(*m*) *Willett* v. *Sparrow* (1816), 6 Taunt. 576.

(*n*) *Cleghorn* v. *Des Anges* (1819), 3 Moore (C. P.), 83. A compromise between the parties is no reason why the sheriff should not return the writ (*Balson* v. *Meggat* (1836), 4 Dowl. 557).

(*o*) *Levi* v. *Abbott* (1849), 4 Exch. 588.

(*p*) R. S. C., Ord. 43, r. 3; and see p. 89, *post*.

(*q*) See p. 19, *ante*.

(*a*) *Rock* v. *Leighton* (1700), 1 Salk. 310; and see p. 15, *ante*.

(*b*) Thus, a return to the effect that the debtor's house is barricaded so that the sheriff cannot ascertain whether he have goods or not is not a good return, and will be set aside by rule *nisi* (*Munk* v. *Cass* (1841), 9 Dowl. 332).

(*c*) *Chambers* v. *Coleman* (1841), 9 Dowl. 588, explaining *Wintle* v. *Chetwynd* (*Lord*), *supra*. Where several writs of *fi. fa.* are delivered simultaneously the form of return is doubtful (*Ashworth* v. *Uxbridge* (*Earl*) (1842), 2 Dowl. (N. S.) 377).

(*d*) *Perkinson* v. *Gilford* (1639), Cro. Car. 539.

(*e*) *Ibid.*

(*f*) *Longdill* v. *Jones* (1816), 1 Stark. 345. A demand before action is not

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summons to the sheriff for an order that he pay over the money may be resorted to, and if an order be made thereon a writ of attachment will be issued to enforce it (*g*). It is no defence to an action for such money that the sheriff has been ordered to retain the money by the House of Commons (*h*). The sheriff is estopped from denying, after such a return, the receipt of the moneys (*i*), or from pleading a subsequent rescue (*j*), but he is not precluded from showing that goods returned as those of the debtor were in fact those of another (*k*), or that the debtor's title has been defeated subsequently (*l*).

Any false statement in a return causing damage to the judgment creditor will give him a right of action against the sheriff for a false return (*m*).

SUB-SECT. 10.—*Writs in aid.*

Writ of *venditioni exponas.*

121. Where it appears upon the return of a writ of *fieri facias* that the sheriff has seized but not sold any goods of the judgment debtor, the judgment creditor is entitled, on the writ with such return being filed as of record, to sue out a writ of *venditioni exponas* (*n*). This writ is a part of the *fieri facias* directing the sheriff to execute it in a particular manner, namely, to sell for the best price obtainable (*o*). The judgment creditor cannot proceed summarily against the sheriff on the return above mentioned. He must proceed by writ of *venditioni exponas* (*p*). But the sheriff must sell under the *fieri facias* notwithstanding the return to the

necessary (*Dale* v. *Birch* (1813), 3 Camp. 347), except as affecting the court's discretion as to costs (*Jefferies* v. *Sheppard* (1820), 3 B. & Ald. 696).

(*g*) *Stockdale* v. *Hansard* (1840), 3 Per. & Dav. 330. Being an officer of the court, the sheriff may be ordered to pay interest (*R.* v. *Villers* (1823), 11 Price, 575).

(*h*) *Stockdale* v. *Hansard, supra.*

(*i*) *Field* v. *Smith* (1837), 5 Dowl. 735. He becomes a debtor by record (19 Vin. Abr., tit. Sheriff, p. 440 (L), 2).

(*j*) *Mildmay* v. *Smith* (1670), 2 Wms. Saund. 343; *Clerk* v. *Withers* (1704), 2 Ld. Raym. 1072, *per* HOLT, C.J., at p. 1075.

(*k*) *Stimson* v. *Farnham* (1871), L. R. 7 Q. B. 175, *per* COCKBURN, C.J., at p. 178, dissenting from a *dictum* of Lord CAMPBELL in *Remmett* v. *Lawrence* (1850), 15 Q. B. 1004, at p. 1010.

(*l*) *Standish* v. *Ross* (1849), 3 Exch. 527; *Brydges* v. *Walford* (1817), 6 M. & S. 42; but see *Field* v. *Smith* (1837), 5 Dowl. 735.

(*m*) But not otherwise (*Wylie* v. *Birch* (1843), 4 Q. B. 566, 577; *Levy* v. *Hale* (1859), 29 L. J. (C. P.) 127; and *Dennis* v. *Whetham* (1874), L. R. 9 Q. B. 345, 348); as to this, see also p. 23, *ante*.

(*n*) R. S. C., Ord. 43, r. 2; *Cameron* v. *Reynolds* (1776), 1 Cowp. 403. By r. 5 writs of *venditioni exponas, distringas nuper vicecomitem, fieri facias de bonis ecclesiasticis, sequestrari de bonis ecclesiasticis,* and all other writs in aid of a writ of *fi. fa.* or of *elegit* may be issued and executed in the same cases and in the same manner as heretofore. The sheriff can sell under the *fi. fa.* for any price if the goods have been properly advertised and there is no negligence (*Cramer* v. *Murphy* (1887), 20 L. R. Ir. 572).

(*o*) *Keightley* v. *Birch* (1814), 3 Camp. 521; *Hughes* v. *Rees* (1838), 4 M. & W. 468.

(*p*) *Clutterbuck* v. *Jones* (1812), 15 East, 78; *Ruston* v. *Hatfield* (1819), 3 B. & Ald. 204. The sheriff can be compelled to make a return to a writ of *venditioni exponas* (*R.* v. *Berks* (*Sheriff*) (1839), 8 Dowl. 97).

above effect (*q*), and may be liable to an action for negligence in not so doing (*r*).

The sheriff can sell under this writ for under the value notwithstanding that he have returned what the value is (*s*). The return to this writ must be of the sum for which the goods were sold (*t*). If the sheriff refuse to sell he may be distrained under a *distringas* issued to the coroner (*u*) or attached by the court, though attachment will not be ordered to issue against the sheriff if he returns that the goods are in his hands (*a*), unless he is trifling with the court (*b*). A return that he retains the sum realised for another judgment creditor under a prior writ is bad (*c*).

Writ of *distringas nuper vicecomitem*.

122. Where the sheriff has returned that goods remain in his hands for want of buyers and then has gone out of office, the remedy against him is by writ of *distringas nuper vicecomitem* (*d*).

The writ is directed to the sheriff in office to distrain on his predecessor, so that he sell the goods retained by him for the best price obtainable. The issues of the distress can be increased upon summary order in case of delay in selling (*e*).

SECT. 2.—*Writ of Elegit.*

SUB-SECT. 1.—*Nature, Form, and Effect.*

Writ of *elegit*.

123. The usual method of execution against land under a judgment or order for the recovery or payment of a sum of money is by writ of *elegit* (*f*). Under this writ the lands of the judgment debtor are delivered to the judgment creditor, to be held by him until the satisfaction of the debt. The writ does not provide for,

(*q*) *Jeanes* v. *Wilkins* (1749), 1 Ves. Sen. 195.

(*r*) *Aireton* v. *Davies* (1833), 9 Bing. 740; *Jacobs* v. *Humphrey* (1834), 2 Cr. & M. 413. Nominal damages only are recoverable unless special damage is proved (*Bales* v. *Wingfield* (1833), 2 Nev. & M. (K. B.) 831; *Levy* v. *Hale* (1859), 6 Jur. (N. S.) 702).

(*s*) *Slye's Case* (1619), Godb. 276; *R.* v. *Bird* (1680), 1 Show. 87.

(*t*) *R.* v. *Jones* (1814), 1 Price, 205; *Mahony* v. *Blake* (1832), Alc. & N. 115.

(*u*) *Clerk* v. *Withers* (1704), 6 Mod. Rep. 290, 300.

(*a*) *Leader* v. *Danvers* (1798), 1 Bos. & P. 359.

(*b*) *Anon.* (1815), 2 Chit. 390.

(*c*) *Rowe* v. *Tapp* (1821), 9 Price, 317.

(*d*) See R. S. C., Ord. 43, r. 5; and p. 24, *ante*. The necessity for this remedy seldom arises. The transfer of partly executed writs and process from one sheriff to the next is provided for by s. 28 of the Sheriffs Act, 1887 (50 & 51 Vict. c. 55); see title SHERIFFS AND BAILIFFS.

(*e*) *Philips* v. *Morgan* (1821), 4 B. & Ald. 652; *Nowell* v. *Underwood* (1836), 5 Dowl. 229. The issues can be sold for the costs (*Raban* v. *Plaistow* (1771), 5 Burr. 2727). The application to increase the issues is by summons *ex parte*, unless the increase sought is large (*Monins* v. *Smith* (1841), 5 Jur. 294).

(*f*) The writ of *elegit* was created by the Statute of Westminster II. c. 18 (1285), 13 Edw. 1, c. 18. By that statute a judgment creditor might at his election sue out a writ that the sheriff cause the moneys due to be made of the lands and goods of the debtor by delivering to the creditor all the chattels of the debtor and the one half of his land. This was extended by the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 11, to the whole of his land, and it was restricted so as to exclude all goods and personal chattels by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 146. There are no special rules of court regulating the practice under writs of *elegit*. They are to have the same force and effect, and be executed as heretofore (R. S. C., Ord. 43, r. 1). For form of the writ, see R. S. C. App. 8, No. 3.

SECT. 2. Writ of Elegit.

or contemplate, a sale. It is addressed to the sheriff required to execute it, and commands him to deliver the lands to the judgment creditor at a reasonable value (or "extent") to hold to him and his assigns until the debt shall have been levied (*g*), and to make a return of the writ (*h*).

The writ of *elegit* has no such binding power over the lands of the debtor, either when issued or when delivered to the sheriff, as that of the writ of *fieri facias* over goods (*i*).

SUB-SECT. 2.—*In what Cases applicable.*

When applicable.

124. Whenever execution may issue upon a judgment or order of the High Court (*k*) for the recovery, or payment to a person, of a sum of money or costs (*l*), the judgment creditor who desires to execute such judgment upon the lands of the judgment debtor may immediately (*m*) apply for the issue of one or more writs of *elegit* (*n*). Two writs of *elegit* cannot be issued simultaneously in the same county (*o*), and after the issue of an *elegit*, and the extending of the lands of the judgment debtor thereunder (*p*), no *fieri facias*, or other process whatever, may be issued in respect of the same debt, unless the judgment creditor be evicted from the land extended under the writ (*q*). The judgment creditor is, however, entitled, after delivery of one writ of *elegit*, to issue another or other writs

(*g*) See p. 69, *post*.

(*h*) See p. 95, *post*.

(*i*) See, however, p. 70, *post*, as to the effect of registration of a writ of *elegit*.

(*k*) There is no warrant analogous to a writ of *elegit* in the process of the county court.

(*l*) As to when execution may issue, see pp. 5 *et seq.*, *ante*; see also R. S. C., Ord. 42, r. 17; and title JUDGMENTS AND ORDERS.

(*m*) The rules stated at notes (*c*) and (*d*) on p. 38, *ante*, will apply equally to *elegit*.

(*n*) R. S. C., Ord. 42, r. 17. The rules stated in note (*g*), p. 38, *ante*, as applying to writs of *fi. fa.* apply also to writs of *elegit*. Where, however, more than one *elegit* is issued in the same county, even upon two distinct judgments, the sheriff can only be entitled to his poundage and expenses upon the first of such writs executed, for lands once extended cannot be again extended (*Carter* v. *Hughes* (1858), 2 H. & N. 714), and therefore a separate *elegit* for the costs of an action would, if issued, be inoperative unless the judgment debtor had acquired lands since the date of the first extension.

(*o*) See note (*f*), p. 38, *ante*; the rules there stated apply also to *elegit* (see *Goodyere* v. *Ince* (1610), Cro. Jac. 246).

(*p*) *Crawley* v. *Lidgeat* (1614), Cro. Jac. 338; *Mackley* v. *Smith* (1856), 4 W. R. 511; *Carter* v. *Hughes*, *supra*. It was at one time contended that the very issue of the writ, being an "election" by the judgment creditor to take that remedy, acted as a bar to all others; this view has not prevailed, and it is the taking of the land which so operates. See this question discussed and decided in *Foster* v. *Jackson* (1614), Hob. 52, *per* HOBART, J., at pp. 57, 58; and see also *Knowles* v. *Palmer* (1589), Cro. Eliz. 160. As to how far the taking of the land is a satisfaction of the debt, see note (*p*), p. 69, *post*.

(*q*) This exception is the effect of the Act for the Satisfaction of Debts upon Executions, stat. (1540) 32 Hen. 8, c. 5, passed as a modification of the general rule. It operates wherever the tenant by *elegit* is evicted by the lawful owner or dispossessed by the judgment debtor or others without the collusion of the tenant by *elegit* (*ibid.*). A sale of the land under an order on the petition of the judgment creditor is not such eviction (*Mackley* v. *Smith*, *supra*). As to how far this general rule bars equitable execution, see *Leahy* v. *Dancer* (1828), 1 Mol. 313.

of *elegit* (*r*), on the suggestion, to be stated in the second writ, that the debtor has other lands than those seized, in the same county (*s*) or in another county (*t*).

SUB-SECT. 3.—*Issue and Delivery of the Writ.*

Issue and delivery of writ.

125. The procedure on the issue of every writ of execution has been discussed (*u*).

The delivery of both a writ of *elegit* and a writ of *fieri facias*, to be executed, either to the same or different sheriffs is irregular (*v*). After the return of one or more writs of *fieri facias*, the judgment creditor can deliver a writ of *elegit*, or several writs, into different counties, to be executed for the balance of the debt unrecovered (*w*).

SUB-SECT. 4.—*Proceedings under the Writ. The Sheriff's Rights and Duties.*

Sheriff's rights and duties under the writ.

126. The duty of the sheriff when the writ is delivered to him is to make inquiry as to whether the judgment debtor has lands (*x*) within his bailiwick, and, if so (*y*), to take an inquisition by a jury (*z*), and by them to value or "extend" such lands, or sufficient of them to satisfy the writ (*a*). The inquisition should state the lands extended and the value thereof. When this is done,

(*r*) See *R.* v. *Derbyshire, Staffordshire and Worcestershire Junction Railway* (1854), as reported in 23 L. J. (Q. B.) 333, *per* ERLE, J., at p. 335.

(*s*) *Hunger* v. *Frey* (1593), Moore (K. B.), 341 ; *Foster* v. *Jackson* (1614), Hob. 52, *per* HOBART, J., at pp. 57, 58.

(*t*) *Glascock* v. *Morgan* (1663), 1 Lev. 92. It was not necessary to issue the writ into various counties to obtain equitable execution therein (*Dillon* (*Lord*) v. *Plaskett* (1828), 2 Bli. (N. S.) 239, H. L. ; and see note (*f*), p. 49, *ante*).

(*u*) See p. 16, *ante*.

(*v*) *Foster* v. *Jackson*, *supra*, at p. 57.

(*w*) Such writ of *elegit* should contain a recital of what has been done under the former writs, and if it do not will be liable to be set aside at the discretion of the court (*Sherwood* v. *Clark* (1846), 15 M. & W. 764, as affected by R. S. C., Ord. 70, r. 1).

(*x*) That is, lands extendible under the writ, as to which see pp. 65 *et seq.*, *post*.

(*y*) Where there are no lands, the sheriff may return *nihil* or *nil* without holding an inquisition (*Stonehouse* v. *Ewen* (1731), 2 Stra. 874).

(*z*) See p. 64, *post*.

(*a*) This is probably the case, though there are no decisions to the effect that the whole (or, prior to 1838, the half) of the debtor's land cannot be extended for any judgment debt, however small in amount. The inconvenience of having the tenancy by *elegit* of a large estate lasting so short a time as to satisfy a small debt would appear to indicate that a partial extent should be made. This view seems to be supported by *Harbert's Case* (1584), 3 Co. Rep. 11 b, for the judgment creditors need not, although able to do so, extend the land of purchasers from the debtor when extending that of the debtor himself. There is, however, no record of an action for excessive extent, and it appears that no such action could lie, it being an act of the law, not of the party (*Wotton* v. *Shirt* (1600), Cro. Eliz. 742). The wording of the form of the inquisition, which closes with a finding upon oath by the jury that the judgment debtor had no other lands, would certainly appear to require an extent of all the land. Prior to 1664 an extent of land, which at the time of the extent was in the hands of others than the debtor, but was bound by a judgment against him, was void unless the moiety of all land extendible was extended (*Harbert's Case*, *supra*), but by an Act of that year, stat. (1664—5) 16 & 17 Car. 2, c. 5, s. 1, made perpetual by stat. (1670—1) 22 & 23 Car. 2, c. 2 (now repealed), no extent is to be void by reason that any part of the lands extendible are omitted out of such extent. It therefore became unnecessary to make a complete extent.

SECT. 2. Writ of Elegit.

the sheriff should deliver to the judgment creditor what is termed legal possession (*b*) of the lands, and thereupon return (*c*) the *elegit* and inquisition into the court to be filed there (*d*).

Where several writs of *elegit* are delivered to the sheriff against the same debtor, he must execute that which was first delivered to him (*e*). The others cannot be executed until the debt under the first writ be satisfied (*f*).

Death of judgment creditor and judgment debtor.

The death of the judgment creditor, either before the extent of the lands or after, does not affect the validity or continuance of the writ, or of the tenancy by *elegit*, which will devolve as stated hereafter (*g*).

Similarly the death of the judgment debtor after the issue of the writ does not affect its validity, and the sheriff must proceed against lands of the deceased passing to his heir or devisees (*h*).

The inquisition.

127. The inquisition is held by the sheriff, together with a sworn jury of twelve men (*i*) duly qualified to serve as jurors at *nisi prius* (*k*), and the charge to the jury is to inquire of what land (*l*) the debtor is seised or possessed within the bailiwick, and the yearly value thereof, and to embody the result of the proceeding in a document likewise termed "an inquisition" (*m*), which should describe the lands in such a manner as would be a sufficient description in a conveyance (*n*). The sheriff and jurors may go into the house or grounds of the debtor, if the doors and gates are open, for the purpose of holding the inquisition, but they must not break in (*o*). The proceedings are *ex parte*, and no notice thereof to the debtor is necessary (*p*). Should the findings of the jury be against the weight of evidence, the inquisition will be set aside and the sheriff

(*b*) As to the effect of this, see p. 65, *post*.

(*c*) See p. 65, *post*.

(*d*) For a general statement of the duties of the sheriff, see *Hele* v. *Bexley* (*Lord*) (1853), 17 Beav. 14, *per* Lord ROMILLY, at p. 25.

(*e*) *Guest* v. *Cowbridge Rail. Co.* (1868), L. R. 6 Eq. 619.

(*f*) *Carter* v. *Hughes* (1858), 2 H. & N. 714. The judgment creditor issuing the second writ can bring proceedings to remove the legal impediment of the first writ on paying off the creditor thereunder (*Guest* v. *Cowbridge Rail. Co.*, *supra*).

(*g*) *Harrison* v. *Bowden* (1660), 1 Sid. 29; *Clerk* v. *Withers* (1704), 6 Mod. Rep. 290, *per* HOLT, C.J., at p. 300.

(*h*) Tidd's Practice, 9th ed., Vol. II., p. 1034.

(*i*) The extent must be *per sacramentum duodecim proborum et legalium hominum* (*Palmer's Case* (1597), 4 Co. Rep 74 a, 74 b; *Anon.* (1554), 1 Dyer, 100 a, pl. 71; *Garraway* v. *Harrington* (1620), Cro. Jac. 569; *Fulwood's Case*, (1591), 4 Co. Rep. 64 b, 65 a.

(*k*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 52; see title JURIES.

(*l*) That is, land extendible; see pp. 65 *et seq.*, *post*. Proof of the receipt of rents or possession is evidence of title upon which a jury must act (*Barnes* v. *Harding* (1857), 1 C. B. (N. S.) 568).

(*m*) This inquisition is a deed made by the sheriff and the twelve jurors. For the form, see Chitty's Forms, 13th ed., 420.

(*n*) Formerly it was necessary to extend the land "by metes and bounds," but since the operation of the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 11, put an end to the necessity for dividing the judgment debtor's land, this has no longer been held to be necessary (*Doe* d. *Roberts* v. *Parry* (1844), 13 M. & W. 356; *Sherwood* v. *Clark* (1846), 15 M. & W. 764).

(*o*) *Semayne's Case* (1604), 5 Co. Rep. 91 a; 1 Smith, L. C., 11th ed., p. 104.

(*p*) See *Steed* v. *Layner* (1725), 2 Ld. Raym. 1382.

directed to take a new one (*q*). If the inquisition be bad on its face, it is simply void, and need not be set aside (*r*).

Delivery of possession to judgment creditor.

128. Upon the inquisition taken the sheriff delivers what is termed legal possession of the land (*s*) to the judgment creditor at the yearly value found (*t*). No particular act, symbolical or otherwise, is necessary to constitute such delivery (*u*). The sheriff does not deliver actual possession of the land to the judgment creditor, and the latter has merely a right of entry, and must, if not peaceably admitted, bring an action to obtain possession (*v*). The "inquisition" forms the sheriff's return to the writ, and upon such return, and its entry in the record of the court, depend the judgment creditor's title as tenant by *elegit* (*w*).

As against a trustee in bankruptcy, the execution is completed by seizure when the lands are delivered to the judgment creditor (*x*), and he has given notice to tenants to pay their rents to him, although no return has as yet been made to the writ (*a*).

SUB-SECT. 5.—*What can be taken under Elegit.*

What may be taken.

129. The sheriff under a writ of *elegit* may deliver in execution to the judgment creditor all the lands (*b*), tenements, lay (*c*)

(*q*) *Barnes* v. *Harding* (1857), 1 C. B. (N. S.) 568.

(*r*) *Fenny* d. *Masters* v. *Durrant* (1817), 1 B. & Ald. 40; *Morris* v. *Jones* (1823), 2 B. & C. 232, 243.

(*s*) *Hele* v. *Bexley* (*Lord*) (1853), 17 Beav. 14, *per* ROMILLY, M.R., at p. 25; *Addison* v. *Tate* (1855), 11 Exch. 250, *per* POLLOCK, C.B., at p. 254.

(*t*) The sheriff cannot deliver the lands to the judgment creditor at another value than that found by the jury (*Comyrrs* v. *Brandling* (1614), 1 Brownl. 38). As to the effect of delivery "at" a value, see p. 69, *post*.

(*u*) Delivery completes the seizure without a return of the writ (*Hoe's Case* (1600), 5 Co. Rep. 89 b, 90 a).

(*v*) See *Jefferson* v. *Dawson* (1673), 3 Keb. 243; *Taylor* v. *Cole* (1789), 3 Term Rep. 292, *per* KENYON, C.J., at p. 295; *Addison* v. *Tate* (1855), 11 Exch. 250, *per* POLLOCK, C.B., at p. 254; *Hatton* v. *Haywood* (1874), 9 Ch. App. 229, *per* MELLISH, L.J., at p. 236. But if actual possession be delivered, the judgment debtor has no remedy (*Jefferson* v. *Dawson*, *supra*).

(*w*) *Fulwood's Case* (1591), 4 Co. Rep. 74 a. "Without the return it is naught worth." The return should be made by the sheriff direct to the court. It is not sufficient, though it is the usual practice, to deliver the writ and inquisition to the judgment creditor's solicitor (*Johns* v. *Pink*, [1900] 1 Ch. 296, 307). The fee of 2*s*. 6*d*., payable on the return, falls upon the sheriff (*ibid*.). If no lands extendible under the writ are found on the inquisition the return will be a return of *nihil* or *nil*, which should also be made where the sheriff is satisfied without inquisition that there are no such lands (see note (*y*), p. 63, *ante*). Where it is found that the judgment debtor is a beneficed clerk and has no lay fee in the bailiwick, this fact should be stated in the inquisition (R. S. C., Ord. 43, r. 3).

(*x*) For the purpose of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 45; see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 271, 273.

(*a*) *Re Hobson* (1886), 33 Ch. D. 493, 496.

(*b*) Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 11. This was one of the most important changes introduced by this Act. Previously only a moiety of the debtor's lands was liable. Formerly the debtor's goods could be taken, but the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 146, put an end to that.

(*c*) The words "tithes" and "rectories" used in the Judgments Act, 1838 (1 & 2 Vict. c. 110), ss. 11, 13, relate only to lay rectories and tithes (*Hawkins* v. *Gathercole* (1855), 6 De G. M. & G. 1, C. A.; *Sweeny* v. *Fleming* (1863), 14 I. Ch. R. 23).

SECT. 2. Writ of Elegit.

rectories and tithes, rents and hereditaments, including lands and hereditaments of copyhold, of which the judgment debtor, or any person in trust for him, at the time of the registration of the writ (*d*) was seised or possessed, or over which he had a disposing power capable of uncontrolled exercise in his own favour.

Legal estates of freehold, whether held in fee simple, in tail (*e*), for life (*f*), or *pour autre vie* (*g*), and whether subject or not to existing tenancies (*h*) for terms of years, are extendible under the writ.

A reversion upon a lease for lives can also be taken (*i*), but a remainder, not being in seisin or in possession, is not extendible (*k*). Lands held in ancient demesne (*l*), or in copyhold (*m*), can be taken. Ecclesiastical land, such as glebe or tithe rentcharge, cannot be taken (*n*); and it is doubtful whether or not an advowson can be extended (*o*).

Chattels real, such as leases for terms of years, may be extended as falling within the definition of lands possessed (*p*) by the

(*d*) This, it is submitted, is the effect of reading the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 11, together with the Land Charges Act, 1900 (63 & 64 Vict. c. 26), s. 2 (1); see note (*a*), p. 72, *post*. The land will be charged from the date of registration; see title JUDGMENTS AND ORDERS.

(*e*) But not after his death (*Ashburnham* v. *St. John* (*Lord*) (1605), Cro. Jac. 85).

(*f*) *Davis* v. *Marlborough* (*Duke*) (1819), 2 Swan. 108, 121.

(*g*) If the estate determines before the judgment creditor is satisfied, he is still a creditor for the balance unpaid (*Leahy* v. *Dancer* (1828), 1 Mol. 313).

(*h*) Under the word "rents" in the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 11. And the tenant by *elegit* is entitled to sue or to distrain for the rent (*Bristow's* (*Bishop*) *Case* (1584), 3 Leon. 113), without the necessity of attornment (*Lloyd* v. *Davies* (1848), 2 Exch. 103); but the rent must have accrued after the inquisition (*Sharp* v. *Key* (1841), 8 M. & W. 379). It makes no difference that the lease is by way of mortgage (*Poole Corporation* v. *Whitt* (1846), 15 M. & W. 571).

(*i*) *Anon.* (1580), 3 Dyer, 373 b, pl. 14.

(*k*) *Re South* (1874), 9 Ch. App. 369; *Re Hamilton* (*Infants*) (1885), 31 Ch. D. 291, C. A.; *Re Harrison and Bottomley*, [1899] 1 Ch. 465, C. A. A remainder is not charged by the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 13 (*Hood Barrs* v. *Cathcart*, [1895] 2 Ch. 411).

(*l*) *Cox* v. *Barnsly* (1614), Hob. 47, pl. 53; *Martin* v. *Wilks* (*circa* 1583) Moore (K. B.), 211.

(*m*) Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 11. This is a change in the law introduced by the Act. The tenant by *elegit* of any copyhold is required to pay and render the judgment debtor's customary payments and services to the lord of the manor, and is entitled to hold the land until the amount of such payments and the value of such services, as well as the amount of the judgment, shall have been levied (*ibid.*).

(*n*) *Arbuckle* v. *Cowtan* (1803), 3 Bos. & P. 321, 327; *Hawkins* v. *Gathercole* (1855), 6 De G. M. & G. 1, 16, C. A.; *Sweeny* v. *Fleming* (1863), 14 I. Ch. R. 23. Execution against such lands can only be effected by writ to the bishop (see p. 89, *post*).

(*o*) See *Robinson* v. *Tonge* (1735), 3 P. Wms. 398, 401, where the point is considered, but not decided, by TALBOT, L.C. The objections were two-fold: no yearly value could be put upon it, and it could not be divided; the former is still valid; see also 2 Cru. Dig., p. 54, pl. 71.

(*p*) *Johns* v. *Pink*, [1900] 1 Ch. 296; *Fleetwood's* (*Sir G.*) *Case* (1610), 8 Co. Rep. 171 a. "It is at the election of the sheriff either to extend or to sell a lease" (*Comyrr's* v. *Brandling* (1614), 1 Brownl. 38, as reported *sub nom. Comyn* v. *Brandlyn* (1614), Moore (K. B.), 873).

judgment debtor, and if so extended will be delivered to the judgment creditor at a yearly value in the same manner as an estate of freehold, and the lease probably vests legally in the tenant by *elegit* for the whole of the term (*q*), but not in such a way as to render him liable to indemnify the judgment debtor against actions upon the covenants in the lease (*r*), nor yet so as to merge the term in a reversion vested in the tenant by *elegit* (*s*). Other chattels real, such as rentcharges (*t*), can also be taken, but not a rent seck (*a*).

An office which is not assignable cannot be extended (*b*): but neither land held by a public body for a public purpose (*c*), nor land belonging to a railway company and forming part of the permanent way of the line (*d*), nor the principal mansion-house held by a tenant for life (*e*), nor land granted by the Crown for the maintenance of dignities, and with reversion in the Crown, are exempt (*f*).

Lands held jointly or in common with another tenant can be taken (*g*).

Equitable interests in land.

130. The question of equitable interests in land requires some consideration. Where the judgment debtor is a trustee, his interest cannot rightly be taken (*h*), and, if extended, the tenant by *elegit* will be bound by the trust (*i*).

Where, however, he has the legal estate in the land, and is himself entitled to possession in equity, subject to other equities belonging to other persons, as in the case of a legal mortgagee, the lands may be extended, subject to all such equities (*k*).

(*q*) *Johns* v. *Pink*, [1900] 1 Ch. 296, 304, 305, where this question is fully discussed; see also *Spencer's Case* (1583), 5 Co. Rep. 16 a, 17 a; *Carter* v. *Hughes* (1858), 2 H. & N. 714, *per* MARTIN, B., at p. 723, where it is said that the right of the judgment debtor to recover after the satisfaction of the debt is, in the case of leaseholds, only a right to possession, not a reversion. For sale of leaseholds under the writ, see pp. 68 and 69, *post*.

(*r*) *Johns* v. *Pink*, *supra*.

(*s*) *Williams* v. *Morris* (1849), 13 I. Eq. R. 147. As to the merger in the reversion thereon of a tenancy by *elegit* of freehold, see note (*b*), p. 70, *post*.

(*t*) See *Wotton* v. *Shirt* (1600), Cro. Eliz. 742; *Anon.* (1561), Moore (K. B.), 32, pl. 104.

(*a*) *Heydon's Case* (1584), 3 Co. Rep. 7 a.

(*b*) *Anon.* (1536), 1 Dyer, 7.

(*c*) *Arnold* v. *Gravesend Corporation* (1856), 25 L. J. (CH.) 530; *Worral Waterworks Co.* v. *Lloyd* (1866), L. R. 1 C. P. 719, though lands affected with a special trust, as, for instance, sewage works for a greater district than that of the public body against whom judgment was recovered, cannot be taken on that judgment (*Jersey* (*Earl*) v. *Uxbridge Rural Sanitary Authority*, [1891] 3 Ch. 183); see *A.-G.* v. *Wilkinson* (1859), 28 L. J. (CH.) 392.

(*d*) *Re Cowbridge Rail. Co.* (1868), L. R. 5 Eq. 413.

(*e*) *Davis* v. *Marlborough* (*Duke*) (1819), 2 Swan. 108, *per* Lord ELDON, L.C., at pp. 121, 122.

(*f*) *Ibid.*, at p. 136.

(*g*) *Abergavenny's* (*Lord*) *Case* (1607), 6 Co. Rep. 78 b.

(*h*) Accordingly land sold, but not conveyed, may not be taken under an *elegit* against the vendor (*Prior* v. *Penpraze* (1817), 4 Price, 99).

(*i*) *Finch* v. *Winchelsea* (*Earl*) (1720), cited 3 P. Wms. 399; and see title TRUSTS AND TRUSTEES.

(*k*) *Whitworth* v. *Gaugain* (1844), 3 Hare, 416; *Potts* v. *Warwick and Birmingham Canal Navigation Co.* (1853), Kay, 142. The tenant by *elegit* is not a purchaser, and will be postponed whether he has notice of the prior incumbrance or not (*Brace* v. *Marlborough* (*Duchess*) (1728), 2 P. Wms. 491). Where

SECT. 2. Writ of Elegit.

Where the judgment debtor is a *cestui que trust*, lands (*l*) held in trust for him can be taken (*m*) if the trust is a clear and simple trust for the benefit of the judgment debtor alone (*n*). Where, however, the trust is also for the benefit of any other person, the land cannot be extended (*o*). Thus, no land legally mortgaged can be taken under an *elegit* against the mortgagor, the mortgagee being regarded as a trustee for himself and the mortgagor jointly (*p*). Land held by the judgment debtor as tenant by *elegit* under a writ against some other person cannot be extended (*q*). Lands the subject of a disposing power of the judgment debtor are not extendible unless the power is vested solely in the judgment debtor (*r*), and exercisable by him for his own benefit without the assent of any other person (*s*).

Chattels real.

131. In addition to their liability to be extended, chattels real may be taken by the sheriff under the Statute of Westminster II. (*t*), and may be either delivered over to the creditor (*a*) or sold to any

a railway company had given a debenture under the Companies Clauses Acts, the sheriff was restrained from delivering legal possession of the land (or chattels) of the company (*Legg* v. *Mathieson* (1860), 2 L. T. 112, and see title COMPANIES, Vol. V., 732); and as to attempts to secure debenture-holders ranking prior to an *elegit* creditor, even after return of the writ, see *Stevens* v. *Mid Hants Rail. Co.*, *London Financial Association* v. *Stevens* (1873), 29 L. T. 318.

(*l*) Some doubt exists as to whether equitable interests in terms of years can be extended. Under the somewhat different language of the Statute of Frauds (29 Car. 2, c. 3), s. 10 (repealed part), they could not (*King* v. *Ballett* (1691), 2 Vern. 248; *Scott* v. *Scholey* (1807), 8 East, 467, 485); but see *Re Newcastle* (*Duke*) (1869), L. R. 8 Eq. 700; *Doe* d. *Phillips* v. *Evans* (1833), 1 Cr. & M. 450. The language of the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 11, is different, and probably extends to leaseholds held on trust (see *Johns* v. *Pink*, [1900] 1 Ch. 296).

(*m*) The extension of the operation of the writ of *elegit* to equitable estates was first made by the Statute of Frauds (29 Car. 2, c. 3), s. 10 (repealed part), and now operates under the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 11.

(*n*) *Forth* v. *Norfolk* (*Duke*) (1820), 4 Madd. 503; *Harris* v. *Booker* (1827), 4 Bing. 96.

(*o*) *Doe* d. *Hull* v. *Greenhill* (1821), 4 B. & Ald. 684; and see *Tyrrell* v. *Painton*, [1895] 1 Q. B. 202, C. A.

(*p*) *Plunket* v. *Penson* (1742), 2 Atk. 290, 292; *Lyster* v. *Dolland* (1792), 1 Ves. 431; *Hatton* v. *Haywood* (1874), 9 Ch. App. 229. As to an equitable mortgage, see *Whitworth* v. *Gaugain* (1843), 3 Hare, 416.

(*q*) *Huit* v. *Cogan* (1596), Cro. Eliz. 483; *Carter* v. *Hughes* (1858), 2 H. & N. 714.

(*r*) Not, for example, under a judgment against a man and his wife, limited as to the wife to her separate estate, lands over which they have a joint general power of appointment (*Goatley* v. *Jones* (No. 1), *Goatley* v. *Jones* (No. 2), [1909] 1 Ch. 557).

(*s*) Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 11. This also is an alteration in the previous law effected by this enactment.

(*t*) *Richardson* v. *Webb* (1884), 1 Morr. 40; *Palmer's Case* (1597), 4 Co. Rep. 74 a; *Fleetwood's* (*Sir G.*) *Case* (1610), 8 Co. Rep. 171 a; and see *Goodyere* v. *Ince* (1610), Cro. Jac. 246. This is due to the provisions of the Statute of Westminster II. (13 Edw. 1, c. 18), which directed the sheriff to deliver to the judgment creditor "all the chattels of the debtor, saving only his oxen and beasts of his plow upon a reasonable price" (repealed as to "goods and personal chattels" by Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 146).

(*a*) This course was adopted in *Goodyere* v. *Ince*, *supra*, where it was held that such delivery is not a sale under the writ, and therefore, where the execution is void, the judgment debtor will regain possession of the lease, and not merely

other person (*b*) at a reasonable price or (*c*) "appraisement," to be made thereof by the jury holding the inquisition (*d*).

SUB-SECT. 6.—*Tenancy by Elegit.*

Tenancy by *elegit*.

132. Upon the inquisition and return made the judgment creditor becomes tenant by *elegit* (*e*). Tenancy by *elegit* is a chattel interest (*f*) in the land to continue as a legal estate for so long as is required to satisfy the judgment debt at the annual value found (*g*), and as an equitable estate for any further period required until the debt is in fact paid (*h*). The duration of such term is, however, subject to the rights of the judgment debtor to regain possession as hereafter explained (*i*). The tenant by *elegit* is in legal possession of the land (*k*), and can take proceedings by action or otherwise to protect his estate or interest (*l*), and, for the purposes of determining his rights as against a trustee in bankruptcy of the judgment debtor, his execution is completed by seizure (*m*).

He also has a charge upon his debtor's interest in the land, but such charge has not priority to any incumbrance existing at the date of its creation, and does not arise as against purchasers of the land until registration of the writ (*n*).

As has been stated, no other execution can issue for the same debt excepting other writs of *elegit* (*o*).

An *elegit* so executed by extent, returned and filed, is a full satisfaction of the judgment debt (*p*).

its price. The appraisement is, however, binding upon the judgment debtor, and, where no tender has been made by him before delivery, he cannot regain the lease after the judgment creditor has levied the amount of his debt out of the land demised (*Comyn* v. *Brandlyn* (1614), Moore (K. B.), 873).

(*b*) See *Palmer's Case* (1597), 4 Co. Rep. 74 a.

(*c*) Under an *elegit*, as distinguished from a *fi. fa.*, the term can only be sold at the appraisement price (*Palmer's Case, supra*).

(*d*) It will thus be seen that three different methods are available for execution upon terms for years: (1) under a writ of *fi. fa.* they can be seized and sold (see p. 44, *ante*); (2) under a writ of *elegit* they can be extended as lands at an annual value and delivered to the creditor as tenant in *elegit* (see p. 66, *ante*); (3) under a writ of *elegit* they can, as chattels, be delivered to the judgment creditor at a total valuation, or sold for his benefit to another person at such valuation.

(*e*) See p. 65, *ante*.

(*f*) Devolving to the personal representative of the tenant by *elegit*, and, in the case of a freehold, there is a reversion to the debtor (*Dighton* v. *Greenvil* (1693), 2 Vent. 321). The nature of tenancy by *elegit* of a leasehold has already been dealt with (see note (*q*), p. 67, *ante*).

(*g*) *Pullen* v. *Purbeck* (1700), 12 Mod. Rep. 355, *per* HOLT, C.J., at p. 366.

(*h*) *Tyson* v. *Paske* (1705), 2 Ld. Raym. 1212, *per* HOLT, C.J., at p. 1213.

(*i*) See p. 72, *post*.

(*k*) See p. 65, *ante*.

(*l*) For example, he can sue to set aside a prior fraudulent conveyance (*Bennet* v. *Musgrove* (1750), 2 Ves. Sen. 51).

(*m*) Under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 45 (1); see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 273.

(*n*) Under the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 13, as affected by the Land Charges Act, 1900 (63 & 64 Vict. c. 26), s. 2 (1). And see the cases cited in note (*q*), p. 70, *post*. As to registration, see p. 70, *post*; and as to this charge, see also title JUDGMENTS AND ORDERS.

(*o*) See p. 62, *ante*.

(*p*) *Hele* v. *Bexley* (*Lord*) (1883), 17 Beav. 14; and see *Crawley* v. *Lidgeat*

SECT. 2. Writ of Elegit.

The tenant by *elegit* is not a purchaser from the debtor, but a tenant under him, and, as against other persons, stands in his shoes, and is subject to all rights, whether equitable or legal, affecting him (*q*). As a consequence of this, he has no power of tacking to his rights those of a subsequent incumbrancer, so as to postpone an intermediate mortgagee (*r*), nor has he priority over a prior equitable mortgagee of whom he had no notice (*s*), nor any right to set aside a prior voluntary conveyance (*t*), and he holds subject to the debts of an ancestor of the judgment debtor (*a*). One incident of his tenure under the judgment debtor is that if he takes a conveyance of the reversion, or of any portion of the reversion, belonging to the debtor, his tenancy by *elegit* is extinguished as to the whole of the lands (*b*).

SUB-SECT. 7.—*Registration.*

Registration of writ or order.

133. Every writ or order affecting land should be registered at the Land Registry in the name of the judgment debtor. If not so registered, the writ, and every proceeding taken thereunder, is void as against any purchaser for value of the land (*c*).

Until such writ is registered, the judgment upon which it issues will not become a charge on land, or on any interest in land, or on unpaid purchase-money for land (*d*).

In Yorkshire it is necessary that the judgment or order should be registered to obtain priority for execution upon it (*e*).

(1614) Cro. Jac. 338, *per* COKE, C.J., at p. 339: It is "as if he had taken a lease in satisfaction." There are, however, several points to be considered in connection with this rule. Thus there will be no satisfaction if the extent be void (*Pullen* v. *Purbeck* (1700), 12 Mod. Rep. 355, 366, where more than half the debtor's land was shown on the face of the return to have been extended); and the debt will revive on the ejectment of the debtor under an Act for the Satisfaction of Debts upon Execution, stat. (1540) 32 Hen. 8, c. 5, or probably on the determination of the tenure by *elegit* before the actual satisfaction of the debt by any event not the act of the creditor (see *Leahy* v. *Dancer* (1828), 1 Mol. 313); and the "satisfaction" of the debt is, apparently, always subject to the right of the creditor to issue a further *elegit* on discovery of further lands of his debtor (see notes (*r*), (*s*), and (*t*), p. 63, *ante*), and the cases cited in notes (*p*) and (*q*), p. 62, *ante*).

(*q*) *Wickham* v. *New Brunswick and Canada Rail. Co.* (1865), L. R. 1 P. C. 64; *Brace* v. *Marlborough* (*Duchess*) (1728), 2 P. Wms. 491; *Beavan* v. *Oxford* (*Earl*) (1856), 6 De G. M. & G. 507; *Kinderley* v. *Jervis* (1856), 22 Beav. 1; *Eyre* v. *M'Dowell* (1861), 9 H. L. Cas. 619, 624 (decided upon an Irish Act identical in terms with the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 11).

(*r*) *Brace* v. *Marlborough* (*Duchess*), *supra*. Nor can a mortgagee tack further advances as against a tenant by *elegit* (*Champneys* v. *Burland* (1870), 23 L. T. 584). As to tacking generally, see title MORTGAGE.

(*s*) *Whitworth* v. *Gaugain* (1844), 3 Hare, 416.

(*t*) Under stat. (1584-5) 27 Eliz. c. 4 (*Beavan* v. *Oxford* (*Earl*), *supra*).

(*a*) Under the Administration of Estates Act, 1833 (3 & 4 Will. 4, c. 104) (*Kinderley* v. *Jervis*, *supra*).

(*b*) By merger (*Hele* v. *Bexley* (*Lord*) (1853), 17 Beav. 14, 26).

(*c*) Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), ss. 5, 6.

(*d*) Land Charges Act, 1900 (63 & 64 Vict. c. 26), s. 2. A tenancy by *elegit* does not, as between debtor and creditor, appear to be affected by this Act (*Re Pope* (1886), 17 Q. B. D. 743, C. A.).

(*e*) At any rate, as against a purchaser (*Westbrook* v. *Blythe* (1854), 3 E. & B.

SUB-SECT. 8.—*Possession or Sale of Land taken under the Writ of Elegit.*

Possession of land taken under writ.

134. When the judgment creditor has obtained legal possession by delivery from the sheriff, he is entitled to enter into actual possession of the land, and if unable to do so peaceably he may bring an action for recovery of the premises (*f*). He is entitled to demand, and, if necessary, to sue (*g*) or distrain for (*h*), rents from tenants of the lands extended accruing due after the date of the inquisition (*i*), where the immediate reversion to such tenancies was vested in the judgment debtor at the date of the inquisition (*k*). When in actual possession he becomes the landlord, and may give notice to tenants of the land in the same manner as the judgment debtor might do (*l*). He is liable to account to his debtor upon the same footing as if he were a mortgagee in possession (*m*), and if occupying the premises will be charged with an occupation rent (*n*).

Sale of land taken.

135. Where the judgment creditor has obtained legal possession by delivery from the sheriff (*o*), he is entitled forthwith, or at any time afterwards, to obtain from the Chancery Division upon an originating summons (*p*) an order for the sale of his debtor's interest in such land (*q*). Such summons being served upon

737 ; Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 14). Registration of an execution against land in Middlesex under the Middlesex Registry Act, 1708 (7 Ann. c. 20), is not now necessary (Land Charges Act, 1900 (63 & 64 Vict. c. 26), s. 4).

(*f*) See note (*v*), p. 65, *ante*. The inquisition and return give him a *primâ facie* title, but he must also prove the title of the judgment debtor (*Doe* d. *Evans* v. *Owen* (1831), 2 Cr. & J. 71).

(*g*) *Ramsbottom* v. *Buckhurst* (1814). 2 M. & S. 565; *Rogers* v. *Pitcher* (1815), 6 Taunt. 202 ; *Hatton* v. *Haywood* (1874), 9 Ch. App. 229, *per* MELLISH, L.J., at p. 236.

(*h*) *Lloyd* v. *Davies* (1848), 2 Exch. 103.

(*i*) *Sharp* v. *Key* (1841). 8 M. & W. 379.

(*k*) *Harris* v. *Booker* (1827), 4 Bing. 96; *Poole Corporation* v. *Whitt* (1846), 15 M. & W. 571. As evidence of the title of the tenant by *elegit* in such an action, it is sufficient to produce an office copy of the record (*Ramsbottom* v. *Buckhurst*, *supra*), but a tenant can dispute the inquisition and prove that the judgment debtor was not seised (*Harris* v. *Booker*, *supra* ; *Harris* v. *Pugh* (1827), 4 Bing. 335).

(*l*) *Bull* v. *Faulkner* (1847), 1 De G. & Sm. 685, *per* KNIGHT BRUCE, V.-C., at p. 687.

(*m*) *Bull* v. *Faulkner*, *supra* ; see also note (*m*), p. 73, *post*.

(*n*) *Shaw* v. *Murtagh* (1832), Hayes, 586.

(*o*) Where the return has been *nihil* owing to the lands being already extended at the suit of another creditor, no such sale can be ordered (*Re Cowbridge Rail. Co.* (1868), L. R. 5 Eq. 413).

(*p*) In lieu of a petition which was the procedure enacted by the Judgments Act, 1864 (27 & 28 Vict. c. 112), s. 4; see R. S. C., Ord. 55, r. 9B. The costs of a summons only will be allowed where a petition is presented (*Re Martin and Varlow* (1894), 43 W. R. 247 ; *Re Harrison and Bottomley*, [1899] 1 Ch. 465, C. A.). The parties to the summons should be all the persons interested under the Judgments Act, 1864 (27 & 28 Vict. c. 112), s. 5.

(*q*) Judgments Act, 1864 (27 & 28 Vict. c. 112), s. 4. The term "land" apparently includes all lands which could be extended under an *elegit*, although the interpretation section of the Judgments Act, 1864 (27 & 28 Vict. c. 112), s. 2, has been repealed by the Land Charges Act, 1900 (63 & 64 Vict. c. 26), s. 5.

SECT. 2. Writ of Elegit.

the debtor only, the court may direct all such inquiries to be made as to the nature of the debtor's interest and title as shall appear proper (*r*). The practice of the court in relation to such inquiries and order for sale (*s*) is based upon that applied to sales of real estates of deceased persons for the payment of debts (*t*).

If any other debt due on any judgment, statute, or recognisance be discovered which is a charge (*a*) on the land, the creditor entitled to the benefit of such charge must be served with notice of the order for sale, and thereafter is bound thereby, and may attend the proceedings under the same and have the benefit thereof, and the proceeds of the sale are distributed among the persons who may be found entitled thereto, according to their respective priorities (*b*).

Every person claiming any interest in the land through or under the debtor by any means subsequent to the return of the writ of *elegit* is bound by every such order for sale and by all the proceedings (*c*).

SUB-SECT. 9.—*Recovery of the Land by the Judgment Debtor.*

Recovery of the land by judgment debtor.

136. The tenancy by *elegit* may be determined in one of two ways, either by payment of the judgment debt or satisfaction of it out of the profits of the land (*d*), when the judgment debtor will be restored to possession and the tenancy determined (*e*). If, however, the judgment creditor's possession of the land has not been profitable, the court will extend the time of possession (*f*). The tenancy may also determine by merger (*g*).

The judgment debtor can, on the expiration of the tenancy,

Both legal and equitable estates are included (*Wallis* v. *Morris* (1864), 10 L. T. 709).

(*r*) An immediate order for sale may be made (*Re Bithray* (1889), 59 L. J. (CH.) 66; *Re Ogilvie* (1871), 41 L. J. (CH.) 336, C. A.), but it will not be made if it is uncertain whether there is a saleable interest, as, for instance, of surplus lands of a railway company (*Re Bishop's Waltham Rail. Co.* (1866), 2 Ch. App. 382; *Re Kirby, Ex parte Leeds Banking Co.* (*Official Liquidator*) (1866), 14 L. T. 615; *Re Hull and Hornsea Rail. Co.* (1866), L. R. 2 Eq. 262).

(*s*) For the form of order, see *Howson* v. *Trant* (1873), 42 L. J. (CH.) 808; *Re Cooper* (1889), 60 L. T. 95; *Re Holder*, [1890] W. N. 55.

(*t*) Judgments Act, 1864 (27 & 28 Vict. c. 112), s. 4, as amended by the Land Charges Act, 1900 (63 & 64 Vict. c. 26), s. 2. Note, however, the practice as to administration (*Re Hull, Barnsley and West Riding Junction Rail. Co.* (1888), 40 Ch. D. 119, C. A.). As to this section, see further, p. 88, *post*.

(*a*) No such debt can be a charge upon land until a writ or order for the purpose of enforcing it is registered under s. 5 of the Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), by the provisions of the Land Charges Act, 1900 (63 & 64 Vict. c. 26), s. 2 (1). It appears that since the repeal of the Judgments Act, 1864 (27 & 28 Vict. c. 112), s. 1, by the Land Charges Act, 1900 (63 & 64 Vict. c. 26), a judgment or order operates as a charge upon the land when the writ is issued and registered although the lands have not been delivered in execution thereunder.

(*b*) Judgments Act, 1864 (27 & 28 Vict. c. 112), s. 5.

(*c*) *Ibid.*, s. 6.

(*d*) 11 Vin. Abr., tit. Execution, 40 (X a, 2) (1).

(*e*) Burton's Compendium of the Law of Real Property, pl. 868; and see *Johns* v. *Pink*, [1900] 1 Ch. 296, *per* STIRLING, J., at p. 304.

(*f*) *Palmer* v. *Bolls* (1626), Toth. 82.

(*g*) *Hele* v. *Bexley* (*Lord*) (1853), 17 Beav. 14, 25.

bring an action to recover the land (*h*). He need not have recourse to action, and the modern practice is to apply to the court for a reference to chambers to take an account of the rents and profits received by the judgment creditor (*i*), and for an order to restore possession to the debtor if, upon such account, it be found that the judgment has been satisfied (*k*).

The tenant by *elegit* holds his estate subject to such account (*l*), which is taken on the basis, not of the extended value of the land, but of the actual sums received by him, with just allowances, as against the amount of his judgment and interest (*m*). He is chargeable for wilful default (*n*). The tenant by *elegit* cannot be made to bear the costs of the account, even it be found that upon the account he has received too much (*o*).

SECT. 3.—*Capias ad Satisfaciendum; Attachment and Committal.*

Writ of *ca. sa.*: attachment and committal.

137. The mandate of the writ of *capias ad satisfaciendum* (usually known as a *ca. sa.*) is to take the execution debtor, if he should be found in the bailiwick, and him safely keep so that the sheriff may have his body before the High Court of Justice to satisfy the execution creditor the amount payable under the judgment or order. No person can be arrested or imprisoned for making default in payment of a sum of money except default in payment in one of the six cases provided for in the Debtors Act, 1869 (*p*). In three of the cases—namely, (1) default in payment of a penalty

(*h*) And if he has been ousted from possession he can in law hold on re-entry until the whole debt is paid (*Corbet's* (*Sir Andrew*) *Case* (1600), 4 Co. Rep. 81 b). The debtor formerly, in addition to his remedy by ejectment, had a right to a writ of *scire facias ad rehabendam terram*.

(*i*) See note (*m*), *infra*.

(*k*) *Price* v. *Varney* (1825), 3 B. & C. 733.

(*l*) Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 11.

(*m*) The account will be taken on the following basis:—As against the judgment debtor, the judgment creditor is liable to account as a mortgagee for all profits actually received by him (*Marsh* v. *Lee* (1670), 2 Vent. 337, 338; *Yates* v. *Hambly* (1742), 2 Atk. 360, *per* Lord HARDWICKE, L.C., at p. 362; *Bath* (*Earl*) v. *Bradford* (*Earl*) (1754), 2 Ves. Sen. 587, *per* Lord HARDWICKE, L.C., at pp. 589, 590) or which but for his wilful default he would have received (see *Williams* v. *Price* (1824), 1 Sim. & St. 581; *O'Brien* v. *Mahon* (1842), 2 Dr. & War. 306; *Bull* v. *Faulkner* (1847), 1 De G. & Sm. 685). In such account the judgment debtor must allow credit for interest (*Bath* (*Earl*) v. *Bradford* (*Earl*), *supra*; *Lewes* v. *Morgan* (1829), 3 Y. & J. 394, *per* ALEXANDER, C.B., at p. 395). As against another creditor of the estate of the judgment debtor, the tenant by *elegit* is not liable for sums which he would have received but for his wilful default, except after the date of the writ issued by such creditor for an account (*Holton* v. *Lloyd* (1827), 1 Mol. 30; *M'Donnell* v. *Walshe* (1842), 2 Dr. & War. 252, explained in *O'Brien* v. *Mahon*, *supra*). Where the land has remained a long time under the tenancy by *elegit* without an account being taken, and has changed hands several times, it is doubtful whether the creditor should account for more than the value of the extent (*Poole* v. *Guise* (1687), 1 Vern. 468). As to the basis of accounts against mortgagees, see title MORTGAGE.

(*n*) See *Williams* v. *Price*, *supra*; *O'Brien* v. *Mahon*, *supra*; *Bull* v. *Faulkner*, *supra*.

(*o*) *Owen* v. *Griffith* (1749), Amb. 520.

(*p*) 32 & 33 Vict. c. 62, s. 4; see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 337—345, where imprisonment for debt and the procedure under the Act are dealt with.

SECT. 3. Capias ad Satisfaciendum; Attachment and Committal.

or sum in the nature of a penalty other than a penalty in respect of any contract; (2) default by a trustee or person acting in a fiduciary capacity and ordered by the court to pay a sum in his possession or under his control; (3) default by a solicitor in payment of costs, when ordered for misconduct as such solicitor or in payment of a sum of money when ordered to pay the same in his character of an officer of the court making the order (*q*)—the writ of *capias ad satisfaciendum* is still theoretically available (*r*), but it has completely fallen out of use. In the two last-mentioned cases a writ of attachment (*s*) has taken its place, and in cases of orders of the court for payment the order of committal for disobedience is solely resorted to (*t*).

SECT. 4.—*Writ of Delivery. Writ of Assistance.*

Writ of delivery.

138. A judgment for the recovery of any property other than land or money may, on an order made on application to the court or a judge (*a*), be enforced by writ of delivery (*b*). The usual form of the writ of delivery orders the sheriff to cause the property therein specified to be returned to the plaintiff, or to levy against the defendant the value thereof assessed in the judgment, and the assessed damages for its detention and the costs of the action (*c*). This leaves it to the option of the defendant either to return the goods or to pay the value (*d*), but the court or a judge may, upon application by the plaintiff, order that execution shall issue for the delivery of the property without giving the defendant the option of retaining it upon paying the value assessed (if any). On such an order the writ is known as a writ of delivery absolute, and, as the alternative to the recovery of the property, orders the sheriff to distrain the defendant by all his lands and chattels until he deliver the property to the plaintiff (*e*). It is not necessary that the value of the goods should be assessed as a condition precedent to the exercise of this discretion in ordering the issue of a writ of delivery absolute (*f*).

(*q*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4.

(*r*) The issue, indorsement, and delivery to the sheriff of a *ca. sa.* are in general governed by the same rules as in the case of writs of *fi. fa.*, but as the writ is for practical purposes obsolete it is not further dealt with in this work.

(*s*) The writ of attachment and the order for committal are proceedings to enforce judgments and orders, but fall more appropriately under the subject of contempt of court; see title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., pp. 297 *et seq.*

(*t*) See note (*s*), *supra.*

(*a*) Made in the King's Bench Division, *ex parte* to a master on affidavit, and in the Chancery Division by *ex parte* summons.

(*b*) R. S. C., Ord. 42, r. 6.

(*c*) Or a separate writ of *fi. fa.* may issue for such damages and costs, presumably including the cost of the writ of delivery (R. S. C., Ord. 48, r. 2).

(*d*) The property in the goods remains in the plaintiff until the assessed value has been paid, or has been realised on execution (*Brinsmead* v. *Harrison* (1872), L. R. 7 C. P. 547, Ex. Ch.; *Re Scarth* (1874), 10 Ch. App. 234; *Re Ware, Ex parte Drake* (1877), 5 Ch. D. 866, C. A.). As to the power of the court to order specific restitution of chattels, see also the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 52, and titles SALE OF GOODS; TROVER AND CONVERSION.

(*e*) For form of the writ of delivery, see R. S. C. App. H, No. 10.

(*f*) The addition of the words "if any" in R. S. C., Ord. 48, r. 1, renders

SECT. 4. Writ of Delivery. Writ of Assistance.

So far as the writ of delivery is for the recovery of money, it is subject to the rules governing writs of *fieri facias*, and such rules also apply so far as they are applicable to the delivery of chattels. Thus, a sheriff cannot break into a house to execute the writ (*g*).

Under a writ of delivery absolute the sheriff cannot, if the defendant refuse to deliver the goods, seize them and place the plaintiff in possession of them, his only course being to distrain as directed by the writ until the defendant delivers the goods (*h*).

Contempt.

139. If the judgment or order for recovery of the chattel is personal, and goes on to direct that the defendant do return it to the plaintiff, the remedy for contempt in case of disobedience can be resorted to even after failure of the writ of delivery to obtain the chattel (*i*).

Writ of assistance.

140. In some cases, where the judgment or order is personal, and the remedy by writ of delivery or by ordinary process for contempt would be probably futile—for example, where the person in contempt has absconded—a writ termed a writ of assistance may be directed to issue. This writ may also be resorted to where possession of documents or securities is desired and the person against whom an order for delivery has been made is out of the jurisdiction, or where sequestrators experience difficulty in obtaining possession of the chattels of the persons against whom sequestration has been granted (*j*).

The writ of assistance is a process for contempt, and is only issued after service of a duly indorsed order (*k*). The writ is obtained on *ex parte* motion, supported by an affidavit which must show that the order was not complied with within the time limited therein (*l*). The writ is directed to the sheriff, and recites a contempt of court in disobedience to a judgment or order of the court, and the order for the issue of the writ, and commands the sheriff to put the applicant into possession of the chattels or property of which delivery is ordered (*m*), and to defend and keep him in quiet possession (*n*).

Chilton v. *Carrington* (1855), 15 C. B. 730, and *Corbett* v. *Lewin*, [1884] W. N. 62, obsolete; see *Ivory* v. *Cruickshank*, [1875] W. N. 249, and *Hymas* v. *Ogden*, [1905] 1 K. B. 246, C. A., *per* COLLINS, M.R., at p. 250. In the old practice where the assessment was a condition precedent the parties might agree the value, and the court could thereupon exercise its discretion as to ordering return absolutely or optionally (*Winfield* v. *Boothroyd* (1886), 34 W. R. 501).

(*g*) *Cazet de la Borde* v. *Othon* (1874), 23 W. R. 110.

(*h*) See *Wyman* v. *Knight* (1888), 39 Ch. D. 165.

(*i*) *Hymas* v. *Ogden*, *supra*.

(*j*) See *Wyman* v. *Knight*, *supra*. Or where the chattel has been locked up in a house (*Cazet de la Borde* v. *Othon*, *supra*).

(*k*) *Stribley* v. *Hawkie* (1744), 3 Atk. 275; *Dove* v. *Dove* (1784), 1 Bro. C. C. 375; *Bower* v. *Cooper* (1843), 2 Hare, 408, 412; see *Savage* v. *Bentley*, [1904] W. N. 89. As to indorsement of order and service, see title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., p. 311.

(*l*) *Webster* v. *Taylor* (1854), 18 Jur. 869.

(*m*) The writ was formerly in use principally with respect to land, but the writ of possession was substituted for it (*Hall* v. *Hall* (1878), 47 L. J. (CH.) 680). It is still, however, available in aid of the writ of sequestration as well as of the writ of delivery.

(*n*) For the form of the order, see note to *Wyman* v. *Knight*, *supra*, at p. 167.

SECT. 5. **Writ of Possession.**

SECT. 5.—*Writ of Possession.*

Writ of possession.

141. A judgment or order for the recovery, or for the delivery of, the possession of land (*o*) may be enforced by a writ of possession (*p*), without order of the court. If the judgment or order is for the recovery of land, such writ may issue immediately and without service or notice (*q*); if for the delivery of possession, on the person entitled to possession (*r*) filing an affidavit showing due service of such judgment or order, and that the same has not been obeyed (*s*). There may be either one writ or separate writs of execution for the possession and for the costs at the election of the plaintiff (*t*).

Delivery of possession.

142. The writ may be issued notwithstanding that the title of the plaintiff, though good when the action was begun, has expired before judgment (*a*). It will not be set aside unless the defendant can prove that the writ would be futile or that its issue was not justified by the particular circumstances (*b*).

On the writ being issued, the plaintiff, or someone authorised on his behalf to receive possession, must go upon the premises, together with the sheriff (*c*), to point out, at his own risk, to the sheriff the property whereof possession is to be given. The writ, therefore, need not describe the boundaries (*d*), though it is the

(*o*) An order for foreclosure absolute is not by itself a judgment for recovery of land on which the writ can issue (*Wood* v. *Wheater* (1882), 22 Ch. D. 281).

(*p*) R. S. C., Ord. 42, r. 5. The writ of possession is substituted with respect to land for the writ of assistance (*Hall* v. *Hall* (1878), 47 L. J. (CH.) 680). For a form of writ of possession, see R. S. C., App. H, Nos. 8—9. Issuing a writ of possession in pursuance of a judgment for possession of premises is a proceeding in the Supreme Court, and the costs are in the discretion of the court or judge (*Dartford Brewery Co., Ltd.* v. *Moseley*, [1906] 1 K. B. 462, C. A.).

(*q*) This is the effect of R. S. C., Ord. 47, r. 1, which preserves the practice current prior to 1875. That practice, so far as it is material to execution, is embodied in this section.

(*r*) Such person will, in this section, be referred to as the plaintiff, and the person against whom the writ of possession is enforced as the defendant.

(*s*) R. S. C., Ord. 47, r. 2. The order contemplated by this rule is an order to do an act, and requires to be indorsed under R. S. C., Ord. 41, r. 5 (see p. 6, *ante*), and to be served personally (*Savage* v. *Bentley* (1904), 90 L. T. 641).

(*t*) R. S. C., Ord. 47, r. 3. This order presumably refers to all writs of possession, although in terms only to those for the recovery of land. In Ireland writs of possession do not issue until the costs are taxed (*Beasley* v. *Chapman* (1880), 6 L. R. Ir. 393). Where the writ for costs is combined with that for possession, the form of a *fi. fa.* is added to the writ as in the cases of writs of delivery.

(*a*) *Knight* v. *Clarke* (1885), 15 Q. B. D. 294, C. A. Nor does the fact that the plaintiff has wrongfully distrained for mesne profits due after the judgment disentitle him to the writ (*Doe* d. *Holmes* v. *Davies* (1818), 2 Moore (C. P.), 581).

(*b*) *Doe* d. *Morgan* v. *Bluck* (1813), 3 Camp. 447; *Knight* v. *Clarke*, *supra*; see *Tobin* v. *Cleary* (1872), 7 I. R. C. L. 19.

(*c*) *Floyd* v. *Bethill* (1617), 2 Roll. Abr. 459, tit. Return, H.

(*d*) *Cottingham* v. *King* (1758), 1 Burr. 623, 629; *Connor* v. *West* (1770), 5 Burr. 2672. The risk run by the party is an action for trespass (*Doe* d. *Drapers' Co.* v. *Wilson* (1819), 2 Stark. 477; *Doe* d. *Davenport* v. *Rhodes* (1843), 11 M. & W. 600). If too much is taken it can be put right by order on a summons (*Roe* d. *Saul* v. *Dawson* (1770), 3 Wils. 49). An action may perhaps lie against the sheriff for putting the party into possession of too much (*Lumley* v. *Nevil* (1650), Sty. 238).

modern practice to do so (*e*). The writ contains a *non omittas* clause, the effect of which has been explained (*f*).

The sheriff must at once (*g*) proceed to deliver to the plaintiff complete possession of the premises, turning out, by force if need be, all other persons (*h*), though if the person in possession attorns to the plaintiff this will be sufficient (*i*). In executing the writ the sheriff may break into the house (*k*).

The whole of the premises comprised in the writ must be delivered to the plaintiff, but the delivery of actual physical possession of one of several houses or part of a large estate, to be delivered in the name of the whole, is a sufficient delivery of the whole, unless other parts are in the possession of different persons, when each of such parts must be separately delivered (*l*). If the writ be for the possession of an undivided part of land, it is the duty of the sheriff to set out the land by metes and bounds (*m*), and the persons in possession should not be turned out of the whole of such lands, or out of an estate of which only an ascertained part is within the scope of the writ, but only such part should be delivered to the plaintiff (*n*).

Possession must be delivered in such a manner as not to interfere with an easement, such as a highway existing over the land (*o*).

Completion of execution of writ.

143. The execution is not complete until quiet possession has been delivered to the plaintiff and the bailiffs have gone away (*p*). If the sheriff is interfered with in the execution of the writ, a writ of attachment for contempt can be applied for (*q*). This writ may also be applied for against the defendant if he dispossess the plaintiff (*r*), as distinguished from merely disturbing him (*s*), but

(*e*) *Thynne* v. *Sarl*, [1891] 2 Ch. 79.

(*f*) See p. 19, *ante*.

(*g*) If he delay, the plaintiff can bring an action for damages suffered thereby (*Mason* v. *Paynter* (1841), 1 Q. B. 974).

(*h*) *Upton* v. *Wells* (1589), 1 Leon. 145.

(*i*) *Calvart* v. *Horsfall* (1802), 4 Esp. 167.

(*k*) *Semayne's Case* (1604), 5 Co. Rep. 91 a; 1 Smith, L.C., 11th ed., p. 104.

(*l*) *Floyd* v. *Bethill* (1616), 1 Roll. Rep. 420; 10 Vin. Abr. 539, tit. Execution.

(*m*) *Molineux* v. *Fulgam* (1622), Palm. 289.

(*n*) *Doe* d. *Hellyer* v. *King* (1851), 6 Exch. 791, *per* PARKE, B., at p. 794; *Roe* d. *Saul* v. *Dawson* (1770), 3 Wils. 49; and see Tidd's Practice, 9th ed., Vol. II., p. 1246. Where a judgment for possession is under revision, execution may be stayed as to a part of the lands recovered (*Doe* d. *Forster* v. *Wandlass* (1797), 7 Term Rep. 117, 118, n.).

(*o*) *Goodtitle* d. *Chester* v. *Alker* (1757), 1 Burr. 133, 145; *Doe* d. *R.* v. *York* (*Archbishop*) (1849), 14 Q. B. 81.

(*p*) *Molineux* v. *Fulgam*, *supra*; *Kingsdale* v. *Mann* (1703), 6 Mod. Rep. 27; *Anon.* (1704), 6 Mod. Rep. 115; and see *Upton* v. *Wells*, *supra*, where persons hidden in the house turned the plaintiff out after the sheriff had gone, and it was held that there was no complete execution of the writ. Execution is complete without the return being made (*Hoe's Case* (1600), 5 Co. Rep. 89 b). It is doubtful how far the return is necessary to the sheriff justifying his action under the writ; see *Freeman* v. *Blewitt* (1701), 1 Salk. 409, *per* HOLT, C.J.

(*q*) *Anon* (1705), 2 Salk. 588, where the attachment was ordered, notwithstanding that the writ had been returned, but not filed; *Style's Case* (1610), 2 Brownl. 216; *Kingsdale* v. *Mann*, *supra*.

(*r*) *Smith* v. *Dorset* (*Earl*) (1651), Sty. 277; *Style's Case*, *supra*.

(*s*) *Smith* v. *Dorset* (*Earl*), *supra*; driving off the plaintiff's cattle is a dispossession (*ibid.*); see *Doggett* v. *Roe* (1689), Comb. 150.

SECT. 5. Writ of Possession.

not unless the dispossession follow immediately upon the completion of the execution (*t*).

The plaintiff may also, if dispossessed by the defendant before the return of the writ, apply to the court for a fresh writ of possession, or he may call upon the sheriff to place him again in possession (*a*). If dispossessed by a stranger at any time after possession is given, he is left to his remedy by action, to which he is entitled on the completion of the execution (*b*).

Return to the writ.

The return to the writ, which is subject to the general rules already explained, is that the sheriff did deliver to the person named the premises referred to in the writ, or that neither that person, nor anyone on his behalf, came to point out the land, or to receive possession thereof (*c*).

Reversal of writ.

144. Where the judgment is reversed, or the judgment and the writ of possession are set aside after execution has been completed, an order will be made that the plaintiff do restore possession to the defendant, and, upon disobedience to such order, a writ of restitution (*d*), or an attachment (*e*), may be applied for. The writ of restitution contains a *non omittas* clause (*f*), and directs the

(*t*) *Kingsdale* v. *Mann* (1703), 6 Mod. Rep. 27.

(*a*) *Molineux* v. *Fulgam* (1622), Palm. 289; *Ratcliff* v. *Tate* (1664), 1 Keb. 779; *Devereux* v. *Underhill* (1667), 2 Keb. 245; *Doggett* v. *Roe* (1689), Comb. 150; *R.* v. *Harris* (1699), 12 Mod. Rep. 268; *Linehan's Lessee* v. *Anthony* (1826), Batt. 453; *Massey's Lessee* v. *Ejector* (1835), 1 Jo. Ex. Ir. 457; *Stacpoole* v. *Walsh* (1880), 6 L. R. Ir. 444. A similar new writ of restitution will issue where it is the plaintiff, in under a writ of restitution, who is dispossessed by the defendant (*Doe* d. *Pitcher* v. *Roe* (1841), 9 Dowl. 971). The order for a new writ is made upon summons (*Doe* d. *Thompson* v. *Mirehouse* (1833), 2 Dowl. 200; *Doe* d. *Lloyd* v. *Roe* (1842), 2 Dowl. (N. S.) 407). The writ not now being returnable on a day certain, it can usually be put into execution again before actual return without the necessity of applying for a new writ.

(*b*) *Style's Case* (1610), 2 Brownl. 216; *Ratcliff* v. *Tate*, *supra*; *Doe* d. *Pate* v. *Roe* (1807), 1 Taunt. 55; *Wilson* v. *Chanton* (1862), 6 L. T. 255; but compare *Loveless* (*Chapman's Executor*) v. *Ratcliff* (1664), 1 Keb. 785. The remedy against a stranger is, after possession delivered, by action, whether the writ has been returned or not (*Fortune* v. *Johnson* (1652), Sty. 318).

(*c*) *Floyd* v. *Bethill* (1617), 2 Roll. Abr. 459, tit. Return, H.; *Doe* d. *Pitcher* v. *Role*, *supra*.

(*d*) *Goodright* d. *Russell* v. *Noright* (1738), Barnes, 1783; *Doe* d. *Stephens* v. *Lord* (1837), 7 Ad. & El. 610; *Doe* d. *Stratford* v. *Shail* (1844), 2 Dow. & L. 161; *Doe* d. *Whittington* v. *Hards* (1851), 20 L. J. (Q. B.) 406. The application for the writ is by a summons at chambers. The order must be a direction to some person other than the sheriff, by name (*Doe* d. *Williams* v. *Williams* (1834), 2 Ad. & El. 381; *Doe* d. *Lewis* v. *Ellis* (1841), 9 Dowl. 944). Where a third person, such as a mortgagee, is interested in the land and judgment has been by default, he may take proper proceedings to get the judgment, and the writ of possession issued under it, set aside and be let in to defend (*Jacques* v. *Harrison* (1884), 12 Q. B. D. 165, C. A.). A writ of restitution was formerly, and doubtless still is, also available where possession has been delivered under a wrongful, or irregular, writ of possession (*Thomas* v. *Owen* (1614), 2 Bulst. 194; *Paul Pry* d. *Townshend* v. *Casual Ejector* (1832), Alc. & N. 228); or where possession has been taken of more land than is covered by the writ (*Rochfort* v. *Bermingham* (1873), 7 I. R. C. L. 508).

(*e*) *Davies* d. *Povey* v. *Doe* (1773), 2 Wm. Bl. 892; *Pelham* (*Lord*) v. *Harley* (*Lord*) (*circa* 1713), 3 Swan. 291, n.; *Corbett* d. *Clymer* v. *Nicholls* (1851), 2 L. M. & P. 87.

(*f*) For the *non omittas* clause, see p. 19, *ante*.

sheriff to cause the party to have restitution of the land which is described in the recitals.

SECT. 5. Writ of Possession.

SECT. 6.—*Writ of Sequestration.*

SUB-SECT. 1.—*When the Writ may issue.*

When writ may issue.

145. The writ of sequestration is a process available where the person against whom it is issued is in contempt for disobedience of the court (*g*), and it is, therefore, necessary as a preliminary to its issue that the judgment or order should have been served upon such person, or at least that he should have knowledge of it, and have intentionally evaded such service (*h*).

What may be enforced by writ.

146. With the following exceptions, every decree (*i*), order, or judgment, whether final or interlocutory, upon which any execution may issue (*j*), may be enforced by a writ of sequestration (*k*). A

(*g*) See *Hulbert and Crowe* v. *Cathcart*, [1894] 1 Q. B. 244, *per* WILLS, J., at p. 246: "It is contrary to principle to make an order in the nature of an order in contempt, as a writ of sequestration is, when the person against whom it is made is not in contempt." And see *Guavers* v. *Fountain* (1687), Freem. (CH.) 99; *Beddingfield* v. *Zouch* (1663), Freem. (CH.) 168; *Pratt* v. *Inman* (1889), 43 Ch. D. 175, 179. The issue of a writ of summons is not a condition precedent to the issue of a writ of sequestration (*Re East of England Bank* (1864), 11 L. T. 410). Sequestration was formerly the last, as it is the most stringent, process for contempt, and available only after all other process had been "sat out"; see *Wenman* (*Lord*) v. *Osbaldiston* (1719), 2 Bro. Parl. Cas. 276; *Rowley* v. *Ridley* (1784), 2 Dick. 622, where the old practice on mesne and final process is stated. Instances of the sequestration being ordered for contempt on mesne process are *Trigg* v. *Trigg* (1759), *Detillin* v. *Gale* (1799), *Lupton* v. *Hescott* (1823), all reported 1 Sim. & St. 274, 275; *Re Hassenclever* (1785), 1 Bro. C. C. 434. Whether sequestration could issue against a contemnor already in the custody of the gaoler of another court was formerly doubtful (*Const* v. *Barr* (1826), 2 Russ. 161).

(*h*) Where leave is required to issue the writ, evidence of such service will be required before leave is granted. Where leave is not necessary, it is required under R. S. C., Ord. 43, r. 6. As to dispensing with service in case of evasion, see *Allen* v. *Allen* (1885), 10 P. D. 187; *Hyde* v. *Hyde* (1888), 13 P. D. 166, C. A.; *Re Tuck, Murch* v. *Loosemore*, [1906] 1 Ch. 692, C. A. The provisions of R. S. C., Ord. 41, r. 5, as to indorsement of the order and personal service do not apply to sequestration for costs (*Re Deakin, Ex parte Cathcart*, [1900] 2 Q. B. 478, 481, 482, C. A.).

(*i*) Decrees, or orders, made in divorce or matrimonial causes, are enforceable by sequestration (*Sansom* v. *Sansom* (1879), 4 P. D. 69; *Re Slade, Slade* v. *Hulme* (1881), 18 Ch. D. 653; *Hyde* v. *Hyde* (1888), 13 P. D. 166, C. A.; and see *Craig* v. *Craig*, [1896] P. 171, 174).

(*j*) See pp. 5 *et seq.*, *ante*.

(*k*) This rule, together with the exceptions, embodies the effect of the various orders anthorising writs of sequestration in particular cases. These are:—R. S. C., Ord. 42, rr. 4, 24 (judgments or orders for payment of money into court); *ibid.*, r. 6 (recovery of property other than land or money); *ibid.*, r. 31 (judgments or orders against corporations); Ord. 43, r. 6 (payment of money into court and orders or judgments to do any act within a time limited); *ibid.*, r. 7 (judgment or order for the payment of costs).

For form of the writ of sequestration, see R. S. C., App. H, No. 13.

A writ of sequestration is a writ of execution within the terms of R. S. C., Ord. 42, r. 8, and therefore is issued on the filing of a *præcipe* (*ibid.*, r. 12), and must be indorsed with the name and address of the solicitor or person issuing it (*ibid.*, r. 13). It is not a writ for "the recovery of money," and therefore does

SECT. 6. Writ of Sequestration.

writ of sequestration cannot be issued to enforce a negative injunction (*l*), except against a corporation wilfully disobeying such order (*m*). It cannot be issued to enforce a judgment or order for the recovery of a sum of money (*n*); it will, however, be available, by leave, upon a judgment or order for the payment of costs (*o*), or upon a judgment or order for a payment into court (*p*), or for a payment of money ordered to be made within a time limited (*q*). It cannot be issued to enforce a judgment or order for the recovery (*r*), as distinguished from a personal order for the delivery (*s*), of land. Sequestration may not be issued after the acceptance by the judgment creditor of a composition (*t*). It can be enforced notwithstanding that the person in contempt is already in custody for his contempt (*u*), but it is not necessary that a writ of attachment, or other process, against the person should have issued (*v*). It may issue concurrently with a writ of attachment by way of double process (*w*).

Against whom issued.

147. A writ of sequestration can be issued against a peer (*x*), an infant (*y*), a married woman (*z*), and against a person of unsound

not require the indorsement of the direction to levy which is necessary in the case of other writs, such as *fi. fa.* and *elegit* under *ibid.*, r. 16. See p. 17, *ante*. The writ originated in Lord Nottingham's time; see *Whitehead* v. *Harrison* (1731), 1 Barn. (K. B.) 431. For old form of order of sequestration, see *Pope* v. *Ward* (1785), 1 Cox, Eq. Cas. 194.

(*l*) *Selous* v. *Croydon Rural Sanitary Authority* (1885), 53 L. T. 209.

(*m*) *Ibid.*, under R. S. C., Ord. 42, r. 31, as to the effect of which, see note (*b*), p. 81, *post*.

(*n*) *Hulbert and Crowe* v. *Cathcart*, [1894] 1 Q. B. 244; nor upon such judgment can a personal order, upon which sequestration could be founded, be subsequently made (*ibid.*). A garnishee order is one for the payment of money, and a sequestration will not issue upon it.

(*o*) R. S. C., Ord. 43, r. 7. The form of orders in the Chancery Division for payment of costs is frequently a direction to pay, and therefore non-payment constitutes technically a contempt. The subpœna, now no longer issued (*ibid.*), was under the old practice necessary when no time had been limited in the order for payment of the costs, and after service of the subpœna sequestration issued as of course (*Re Lumley, Ex parte Cathcart*, [1894] 2 Ch. 271, C. A.).

(*p*) R. S. C., Ord. 42, r. 4.

(*q*) *Sprunt* v. *Pugh* (1878), 7 Ch. D. 567; *Re Lumley, Ex parte Cathcart, supra, per* LINDLEY, L.J., at p. 273. For such an order to be effectual to found a writ of sequestration it must have been duly indorsed under R. S. C., Ord. 41, r. 5.

(*r*) See *Re Hoare, Ex parte Nelson* (1880), 14 Ch. D. 41, C. A.

(*s*) R. S. C., Ord. 43, r. 6.

(*t*) *Roe* v. *Davies*, [1878] W. N. 147.

(*u*) *Perryman* v. *Dinham* (1641), 1 Rep. Ch. 152; *Martin* v. *Kerridge* (1733), 3 P. Wms. 240; *Crone* v. *O'Dell* (1821), 2 Mol. 344.

(*v*) This is an alteration in the law effected by s. 8 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), and by R. S. C., Ord. 43, r. 6; see *Sykes* v. *Dyson* (1870), L. R. 9 Eq. 228; *Miller* v. *Miller* (1870), L. R. 2 P. & D. 54.

(*w*) *Crone* v. *O'Dell, supra*.

(*x*) *Shuttleworth* v. *Lonsdale* (*Earl*) (1788), 2 Cox, Eq. Cas. 47. He is not however, apparently, in contempt (at least upon an interlocutory order) until a rule *nisi* has been issued against him and disobeyed (*Smallbrooke* v. *Donnegal* (*Lord*) (1796), 3 Anst. 647).

(*y*) *Anon.* (1684), 2 Cas. in Ch. 163.

(*z*) Though the judgment is against her in respect of her separate estate only (*Worrall* v. *Worrall* (1895), 11 T. L. R. 573), and the form of the writ is not modified if she is restrained from anticipation (*Hyde* v. *Hyde* (1888), 13 P. D. 166, C. A.); see title HUSBAND AND WIFE.

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mind (not so found by inquisition), in enforcement of an order made before he became of unsound mind (*a*).

When leave to issue required.

148. Leave must be obtained before a writ of sequestration can be issued to enforce a judgment or order for the payment of costs (*b*), or against a corporation (*c*).

Corporation.

Any judgment or order against a corporation wilfully disobeying it may be enforced not only by sequestration of the corporate property, but also by sequestration of the property of the directors or other officers thereof (*d*).

Form of Writ.

149. The writ is addressed to not less than four commissioners, called the sequestrators (*e*), who are nominated by the person issuing the writ (*f*), and who need have no special qualification other than that of being capable of keeping an account of the moneys received by them (*g*). They are directed to sequestrate the property of the person in contempt, who is called the contemnor (*h*).

SUB-SECT. 2.—*Effect of the Writ.*

Effect of writ.

150. A writ of sequestration binds the property, other than choses in action (*i*), from the date of its issue (*k*), but the right of the

(*a*) *Robinson* v. *Galland*, [1889] W. N. 108. Such order being served as directed by R. S. C., Ord. 67, r. 5, and Ord. 9, r. 5 (*ibid.*).

(*b*) R. S. C., Ord. 43, r. 7; see also p. 9, *ante*.

(*c*) *I bid.*, Ord. 42, r. 31. The application for leave is made upon summons at chambers supported by affidavit (*Snow* v. *Bolton* (1881), 17 Ch. D. 433), or in special cases upon motion, and the grounds upon which the application is made need not be stated in the notice or summons (*Selous* v. *Croydon Rural Sanitary Authority* (1885), 53 L. T. 209). The writ may in some cases be issued on an *ex parte* application (*Monk* v. *Lawler* (1835), 1 Jo. Ex. Ir. 554). An irregularity in the issue of a writ of sequestration may be waived (*Const* v. *Barr* (1826), 2 Russ. 161).

(*d*) R. S. C., Ord. 42, r. 31. The disobedience must be such as to constitute a contempt of court (*Spokes* v. *Banbury Board of Health* (1865), L. R. 1 Eq. 42; *Sutton* v. *Barnet Local Board*, [1877] W. N. 167; *A.-G.* v. *Walthamstow Local Board*, [1878] W. N. 90; *Fairclough* v. *Manchester Ship Canal Co.*, [1897] W. N. 7, C. A.)—*e.g.*, a refusal to do what has been ordered (*A.-G.* v. *Walthamstow Urban District Council* (1895), 11 T. L. R. 533; *Lee* v. *Aylesbury Urban District Council* (1902), 19 T. L. R. 106); breach of injunction not to infringe a patent (*Spencer* v. *Ancoats Vale Rubber Co.* (1888), 4 T. L. R. 681, C. A.). If an injunction against a corporation has been wilfully disobeyed, sequestration may be ordered to issue whether or not the injunction contained anything mandatory (*A.-G.* v. *Great Northern Rail. Co.* (1850), 15 Jur. 387). The word "wilfully" is intended to exclude only casual, accidental, or unintentional acts of disobedience (*Stancomb* v. *Trowbridge Urban District Council*, [1910] 2 Ch. 190, *per* WARRINGTON, J., at p. 194, following *A.-G.* v. *Walthamstow Urban District Council*, *supra*).

(*e*) See the form of the writ in R. S. C., App. H, No. 13.

(*f*) See *Rowley* v. *Ridley* (1784), 2 Dick. 622, 630.

(*g*) Daniell, Chancery Practice, 7th ed., p. 731, n. (s).

(*h*) By the expression "sequestrate" is meant the setting aside of the property of the contemnor from the possession of those who contend for it (Termes de la Ley, *sub voce* "Sequestration").

(*i*) Choses in action are not bound as against the person owing the debt by the issue, or even by notice of the issue, of the writ, and he is entitled to refuse payment to the sequestrators or make a payment to the contemnor until an order shall have issued from the court (*Johnson* v. *Chippindall* (1827), 2 Sim. 55, 64; *Wilson* v. *Metcalfe* (1839), 1 Beav. 263; *Re Pollard*, *Pollard* v. *Pollard*, [1902] W. N. 144), though in the latter case the debtor so paying may be refused his costs (*Re Pollard*, *Pollard* v. *Pollard*, *supra*).

(*k*) Not from the date of seizure by the sequestrators (*Burdett* v. *Rockley*

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sequestrators to follow and seize property passing into the hands of other persons after that date is not available against a purchaser for value without notice of the writ (*l*). A person claiming the property under a fraudulent conveyance executed for the purpose of evading the sequestration, or having notice of the writ at the time of the conveyance to him, must deliver the property to the sequestrators (*m*).

It must, however, be observed that a sequestration does not give the person issuing the writ any charge over the property seized (*n*), even after the payment into court of the moneys seized (*o*). An order may be made creating such a charge (*p*).

Duty of sequestrators to take possession.

151. Generally speaking, it is the duty of the sequestrators immediately (*q*) upon receipt of the writ to enter upon the property of the contemnor, and to take possession of all his real and personal estate. In so doing they act upon the instructions of the person suing out the writ, who is answerable in damages for any wrong done to any third person (*r*). Such damages should not be recovered by action, but by application for leave to be examined *pro interesse suo* (*s*).

In taking possession of property under the writ, sequestrators are not expected to use force (*t*). They may, however, apparently without leave of the court, break inner doors or boxes to get

(1682), 1 Vern. 58). Where land is sequestered it is bound by the *lis pendens* from the date of the writ, but not by the sequestration until issued (*Crofts* v. *Oldfield* (1676), 3 Swan. 278, n.; and see *Bird* v. *Littlehales* (1743), 3 Swan. 299, n.). As to claims by a trustee in bankruptcy of the contemnor, see note (*m*), *infra*.

(*l*) *Coulston* v. *Gardiner* (1681), 3 Swan. 279, n., 283, n.; *Vicars* v. *Colclough* (1779), 5 Bro. Parl. Cas. 31. As to goods and chattels, the provisions of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 26 (1), and the proviso thereto, are therefore, in the case of a writ of sequestration, merely declaratory of the existing law; see note (*f*), p. 43, *ante*. Therefore a sheriff seizing goods under a *fi. fa.* before the sequestrators have actually seized has prior rights (*Payne* v. *Drewe* (1804), 4 East, 523). Where the land or other property is itself the subject of the judgment or order enforced by the writ the effect of the judgment on the registration of the writ will have to be considered as apart from the effect of the writ; see *Cook* v. *Cook* (1739), 2 Com. 712; and title JUDGMENTS AND ORDERS.

(*m*) *Witham* v. *Bland* (1675), 3 Swan. 276, n.; *Coulston* v. *Gardiner* (1681), 3 Swan. 279, n.; *Bird* v. *Littlehales*, *supra*; *Hamblyn* v. *Ley* (1743), 3 Swan. 301, n.; *Blenkinsopp* v. *Blenkinsopp* (1850), 12 Beav. 568. As to the proper procedure for obtaining it if not so delivered, see p. 86, *post*. Such conveyance need not necessarily be in fraud of creditors within the meaning of stat. (1571) 13 Eliz. c. 5; as to this subject, generally, see title FRAUDULENT AND VOIDABLE CONVEYANCES.

(*n*) Thus in case of the bankruptcy of the contemnor the trustee has priority over the person issuing the writ of sequestration, who is not a secured creditor (*Re Browne*, *Ex parte Hughes* (1871), L. R. 12 Eq. 137; *Re Hastings*, *Ex parte Brown* (1892), 9 Morr. 234).

(*o*) *Re Pollard*, *Ex parte Pollard*, [1903] 2 K. B. 41, 48, C. A.

(*p*) *Ibid.*, *per* ROMER, L.J., at p. 48.

(*q*) Any delay may enable a *bonâ fide* holder for value to be interposed; see *Payne* v. *Drewe*, *supra*.

(*r*) *Copeland* v. *Mape* (1812), 2 Ball & B. 66; but see *Pelham* (*Lord*) v. *Newcastle* (*Duchess*) (*circa* 1713), 3 Swan. 290, n., *per* Serjeant HOOPER; *Dacres* (*Lady*) v. *Chute* (1683), 1 Vern. 160.

(*s*) See note (*f*), p. 83, *post*.

(*t*) Should they do so, they would apparently be protected by the writ, at any rate from any action for damages; see p. 83, *post*.

possession of property affected by the writ (*a*). They cannot, however, interfere with the person of the contemnor (*b*). They have no power to call in the *posse comitatus* (*c*), and it is therefore necessary to resort to the court for assistance in obtaining possession, if they are otherwise unable to obtain it (*d*).

Actions against sequestrators.

152. The sequestrators are officers of the court, and any action against them for anything done by them in pursuance of the writ is liable to be stayed by the court (*e*), in which case the only available remedy is an application to the court for leave to be examined *pro interesse suo* (*f*). Upon any claim being made the court may compel the claimant to come in and prove it (*g*). The court will give directions as to the manner of trial of such claim (*h*), deciding summarily if it think fit (*i*), and upon the hearing of the claim will decide as to any payment to be made (*k*), or as to the restoration of any property (*l*), and may award damages to any party injured (*m*).

Abuse of sequestrator's powers.

153. If a sequestrator, in the performance of his duty, abuses his powers, he commits a contempt of court, and may be punished by attachment (*n*); any resistance to or interference with the

(*a*) *Lowten* v. *Colchester Corporation* (1816), 2 Mer. 395. The contents of boxes should be scheduled when the boxes are broken, but not removed without order (*Pelham* (*Lord*) v. *Newcastle* (*Duchess*) (*circa* 1713), 3 Swan. 290, n.).

(*b*) The writ is *in rem*, not *in personam* (*Tatham* v. *Parker* (1853), 1 Sm. & G. 506).

(*c*) As to this power, see title SHERIFFS AND BAILIFFS.

(*d*) See pp. 84, 86, *post*.

(*e*) This appears to be the result of the cases. Under the old law the Court of Chancery would protect its officers from actions at law over which it had no control. To-day it appears probable that if any real question of liability for excess of powers arose it would be tried out by action, and that minor questions would be determined by examination *pro interesse suo*. The old cases are:—*Walwyn* v. *Awberry* (1677), 1 Mod. Rep. 253; *Pelham* (*Lord*) v. *Newcastle* (*Duchess*), *supra*; *Kaye* v. *Cunningham* (1820), 5 Madd. 406. The court could, however, give leave to bring an action (*Angel* v. *Smith* (1804), 9 Ves. 335; *Anon.* (1801), 6 Ves. 287).

(*f*) *Angel* v. *Smith*, *supra*; *Copeland* v. *Mape* (1812), 2 Ball & B. 66; *Brooks* v. *Greathed* (1820), 1 Jac. & W. 176; *Johnes* v. *Claughton* (1822), Jac. 573; *Burne* v. *Robinson* (1844), 7 I. Eq. R. 188; *Alton* v. *Harrison*, [1869] W. N. 81. The application is made by motion or summons by the person claiming, intituled in the action, and asking for an inquiry whether the applicant has any and what interest in the particular property sequestrated (Daniell, Chancery Forms, 5th ed., p. 452). The application is supported by an affidavit (*Hunt* v. *Priest* (1778), 2 Dick. 540). The claimant may be ordered to make discovery (*Alton* v. *Harrison*, *supra*), and may be admitted to sue *in formâ pauperis* (*James* v. *Dore* (1744), 2 Dick. 788).

(*g*) By granting an injunction against him on notice with leave to come in *pro interesse suo* (*Bird* v. *Littlehales* (1743), 3 Swan. 299, n.; *Johnes* v. *Claughton*, *supra*).

(*h*) *Empringham* v. *Short* (1844), 3 Hare, 461; even directing an action to be brought (*Angel* v. *Smith*, *supra*, *per* Lord ELDON, L.C., at p. 339).

(*i*) *Dixon* v. *Smith* (1818), 1 Swan. 457; notwithstanding *Anon.* (1801), 6 Ves. 287; *A.-G.* v. *Coventry Corporation* (1716), 1 P. Wms. 306, 308, n.

(*k*) As, for example, to mortgagees (*Walker* v. *Bell* (1816), 2 Madd. 21; *Burne* v. *Robinson*, *supra*.

(*l*) *Hamblyn* v. *Ley* (1743), 3 Swan. 301, n.; *Copeland* v. *Mape*, *supra*; *Alton* v. *Harrison*, *supra*.

(*m*) *Copeland* v. *Mape*, *supra*.

(*n*) *Pelham* (*Lord*) v. *Harley* (*Lord*) (*circa* 1713), 3 Swan. 291, n.; *Lowten* v.

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sequestrators in their duties by any person, whether in defence of his own property or otherwise, is also a contempt of court (*o*), and on such resistance or disturbance an injunction will be granted to give the sequestrators possession (*p*).

What property may be taken.

154. Under a writ of sequestration the contemnor's property of every description may be taken, corporeal or incorporeal (*q*), including estates in land, whether freehold (*r*), leasehold (*s*), or copyhold (*t*), and chattels, whether choses in possession (*u*), or choses in action (*v*), including money (*w*) and stocks (*a*), and whether the contemnor's interest therein be legal or equitable.

Property of which the contemnor is merely a trustee cannot be taken (*b*), and choses in action can be taken only where they are alienable by the contemnor (*c*); thus pensions (*d*) are seizable, unless their alienation is forbidden by statute (*e*); and only such property of a married woman restrained from anticipation can be taken as she could herself have alienated (*f*).

Colchester Corporation (1816), 2 Mer. 395; and see *Roe* v. *Davies*, [1878] W. N. 147.

(*o*) *Harvey* v. *Harvey* (1682), 2 Cas. in Ch. 82; *Angel* v. *Smith* (1804), 9 Ves. 335; *Brooks* v. *Greathed* (1820), 1 Jac. & W. 176.

(*p*) *Pelham* (*Lord*) v. *Newcastle* (*Duchess*) (*circa* 1713), 3 Swan. 289, n. On such an order a writ of possession for land could issue (see p. 76, *ante*), formerly a writ of assistance (*Bird* v. *Littlehales* (1743), 3 Swan. 299, n.). A writ of assistance may still issue for chattels personal (see p. 75, *ante*).

(*q*) See *Wilson* v. *Metcalfe* (1839), 1 Beav. 263 (arrears of rentcharge).

(*r*) *Whitehead* v. *Harrison* (1731), 1 Barn. (K. B.) 431.

(*s*) *Ellard* v. *Warren* (1681), 3 Rep. Ch. 48 [87]; *Wharam* v. *Broughton* (1748), 1 Ves. Sen. 180.

(*t*) *Dunkley* v. *Scribnor* (1815), 2 Madd. 443, 444; *Mullins* v. *Bawden* (1615), Toth. 176; and see the cases cited in note (*d*), p. 86, *post*.

(*u*) *Empringham* v. *Short* (1844), 3 Hare, 461, 463 (farming stock, furniture etc.); *Dickinson* v. *Smith* (1813), 4 Madd. 177; *Dixon* v. *Smith* (1818), 1 Swan. 457 (growing crops, grass etc.); see also *Simmonds* v. *Kinnaird* (*Lord*) (1799), 4 Ves. 735, 739.

(*v*) *Miller* v. *Huddlestone* (1882), 22 Ch. D. 233; and see *infra*.

(*w*) No sale being contemplated by the writ, cash can be seized like any other property.

(*a*) *Cowper* v. *Taylor* (1848), 16 Sim. 314; but see *Dundas* v. *Dutens* (1790), 1 Ves. 196, and *M'Carthy* v. *Goold* (1810), 1 Ball & B. 387, *per* Lord MANNERS, L.C., at p. 389.

(*b*) The origin of the writ of sequestration being purely equitable, there has never been any question as to this.

(*c*) An annuity terminable on the contemnor ceasing to be beneficially entitled thereto will determine on the issue of the writ, and, therefore, the sequestrators will not be able to take it (*Dixon* v. *Rowe*, [1876] W. N. 266).

(*d*) Thus the pensions of a county court judge (*Willcock* v. *Terrell* (1878), 3 Ex. D. 323, C. A.), a civil servant (*Sansom* v. *Sansom* (1879), 4 P. D. 69), and an officer in the Indian navy (*Dent* v. *Dent* (1867), L. R. 1 P. & D. 366) are seizable. The order made is that the contemnor be restrained from receiving the pension, and the sequestrators be directed to receive it (*M'Carthy* v. *Goold*, *supra*; *Willcock* v. *Terrell*, *supra*; *Sansom* v. *Sansom*, *supra*).

(*e*) As, for instance, the pension of an officer in the army under the Army Act, 1881 (44 & 45 Vict. c. 58), s. 141 (*Birch* v *Birch* (1883), 8 P. D. 163; *Lucas* v. *Harris* (1886), 18 Q. B. D. 127, C. A.). Money paid in commutation of an inalienable pension can be seized (*Crowe* v. *Price* (1889), 22 Q. B. D. 429, C. A.; and compare *Re Saunders*, *Ex parte Saunders*, [1895] 2 Q. B. 424, C. A.; *Re Ward*, *Ex parte Ward*, [1897] 1 Q. B. 266, C. A.).

(*f*) Thus income accrued due before the order to be enforced is seizable,

Sequestrators are bound by the same restriction as the sheriff acting under a *fieri facias* in respect of the wearing apparel, bedding, and tools of the contemnor (*g*). The military property of soldiers (*h*), rolling stock and plant of railways (*i*), and ecclesiastical property of all kinds are exempt from seizure (*k*).

Rights of third parties.

155. As regards the rights of third parties, it may, generally speaking, be said that the sequestrators may seize all that, and only that, of which the contemnor would at law or in equity be entitled to possession in an action against such persons, and subject to all rights, legal or equitable, belonging to such persons. The exceptions to this rule are—(1) the sequestrators are entitled to property held by third parties under a conveyance in fraud of the sequestration (*l*); (2) it is submitted that the sequestrators, like the sheriff under a *fieri facias*, are not bound by estoppels against the contemnor (*m*); (3) the sequestrators may seize property claimed under a voluntary conveyance, or under a conveyance accepted with knowledge of the issue of the writ, at a date subsequent to such issue (*n*); (4) where the order or judgment for which the sequestration issues is to deliver a specific thing to any person, or to deposit it in court or elsewhere, the sequestrators may seize such thing, being in the custody or power of the contemnor, as if it were his property (*o*).

Effect of death.

156. The death of the person issuing the writ does not prevent or determine the sequestration; his interest therein devolves with his interest in the judgment or order (*p*). In the case of the death

whether in fact paid or not (*Claydon* v. *Finch* (1873), L. R. 15 Eq. 266; *Hood Barrs* v. *Heriot*, [1896] A. C. 174, overruling *Hood Barrs* v. *Cathcart*, [1894] 2 Q. B. 559, C. A., upon this point), but not future income (*Hyde* v. *Hyde* (1888), 13 P. D. 166, C. A.), and not income accrued due since the order (*Re Lumley, Ex parte Hood Barrs*, [1894] 3 Ch. 135, C. A.). As to restraints on anticipation generally, see title HUSBAND AND WIFE.

(*g*) Under the Small Debts Act, 1845 (8 & 9 Vict. c. 127), s. 8; see p. 48, *ante*, though whether the Act would in terms apply appears to be somewhat doubtful if the writ be issued for the enforcement of an order to pay into court or otherwise where the contemnor cannot be termed a "judgment debtor"; see *Johnson* v. *Burgess* (1873), L. R. 15 Eq. 398. The sequestrators would, however, certainly be ordered to proceed as though the Act applied.

(*h*) Under the Army Act, 1881 (44 & 45 Vict. c. 58), ss. 144, 145; see p. 49, *ante*.

(*i*) Under the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 4, made perpetual by stat. (1875) 38 & 39 Vict. c. 31; see p. 49, *ante*.

(*k*) Such property can only be reached by a writ of *sequestrari de bonis ecclesiasticis* or of *fi. fa. de bonis ecclesiasticis*, as to which see p. 89, *post*. The profits of the fellowship of a college are not *bona ecclesiastica* (*Moseley* v. *Warburton* (1697), 1 Ld. Raym. 265).

(*l*) See p. 82, *ante*.

(*m*) See p. 52, *ante*.

(*n*) See p. 81, *ante*.

(*o*) Under the Contempt of Court Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 36), s. 15 (16). Such things are then to be dealt with as the court may direct, and the court may discharge the contemnor upon such terms as to costs or otherwise as it may think fit (*ibid.*).

(*p*) Whether the sequestration be for disobedience of a final or interlocutory order (*Hyde* v. *Forster* (1748), 1 Dick. 132). The representatives of the deceased should be joined in the action (*ibid.*; and see R. S. C., Ord. 17, r. 4). But see *Wharam* v. *Broughton* (1748), 1 Ves. Sen. 180.

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of the contemnor occurring after the issue of the writ (*q*), the sequestration continues in force (*r*), unless it be merely for the purpose of enforcing a personal interlocutory order, such as an order to answer interrogatories (*s*), both against the heir (*a*) and against the personal representatives of the contemnor (*b*). This is, however, not the case where the estate of the contemnor is an estate tail (*c*), or, probably, where the estate is copyhold (*d*). The widow's claim for dower is not affected (*e*).

SUB-SECT. 3.—*Enforcement of the Writ.*

Enforcement of writ.

157. In getting into their hands the property of the contemnor the sequestrators may require the assistance of the court, the form of which will vary with the nature of the property. Thus, to obtain chattels or lands denied to them by the contemnor or others they can apply for attachment for contempt, and for an injunction to be followed by writ of assistance or possession (*f*). To obtain rents due from tenants or debtors of the contemnor they must first obtain, if the money be not paid on request (*g*), an order of the court (*h*). Such order will not usually be granted in the case of tenants until after attornment by them, which will, however, be compelled by order (*i*). Where a real dispute as to liability

(*q*) The case of death before the issue of the writ has been already dealt with; see p. 15, *ante*.

(*r*) *Burdett* v. *Rockley* (1682), 1 Vern. 58; *Hyde* v. *Greenhill* (1745), 1 Dick. 106; *Hawkins* v. *Crook* (1747), 3 Atk. 594; *Maxwell* v. *Kelsey* (1807), 2 Mol. 320; *Pratt* v. *Inman* (1889), 43 Ch. D. 175. It seems in the earlier cases to have been doubtful whether it was not necessary to revive the sequestration by order; see *Whitehead* v. *Harrison* (1731), 1 Barn. (K. B.) 431; *Caermarthen* (*Marquis*) v. *Hawson* (1730), 3 Swan. 294, n., 295, n.

(*s*) *Burdett* v. *Rockley supra; Hawkins* v. *Crook, supra;* and see *Pratt* v. *Inman, supra, per* CHITTY, J., at p. 179.

(*a*) *Caermarthen* (*Marquis*) v. *Hawson, supra;* notwithstanding *University College* v. *Foxcroft* (1683), 1 Vern. 166; see also *Maxwell* v. *Kelsey* (1807), 2 Mol. 320.

(*b*) *Pratt* v. *Inman, supra.*

(*c*) *Athol* (*Earl*) v. *Derby* (*Earl*) (1672), 1 Cas. in Ch. 220.

(*d*) *Hide* v. *Petit* (1667), Freem. (CH.) 125; *Whitehead* v. *Harrison* (1731), 1 Barn. (K. B.) 431; *Caermarthen* (*Marquis*) v. *Hawson, supra.*

(*e*) See *Burdett* v. *Rockley, supra.* Similarly a jointure or annuity secured upon land will be paid to a widow after her husband's death (*Proctor* v. *Reynol* (1640), 1 Rep. Ch. 247; *Langley* v. *Breydon* (1677), cited in 2 Cas. in Ch. 46).

(*f*) See pp. 75, 76, *ante.*

(*g*) A notice requesting payment is usually sent out; see Daniell, Chancery Forms, 5th ed., p. 449.

(*h*) Until such order is made the money may be paid to, or a *bonâ fide* compensation made with, the contemnor; see note (*i*), p. 81, *ante*, and the cases there cited. The debtor or tenant has a right to the order, and may receive his costs thereon (*Opie* v. *Maxwell* (1768), cited 4 Ves. 742; *Cornish* v. *Searell* (1828), 8 B. & C. 471; *White* v. *Wood* (1843), 2 Y. & C. Ch. Cas. 615; *Miller* v. *Huddlestone* (1882), 22 Ch. D. 233).

(*i*) A separate notice is usually sent to tenants calling upon them to attorn to the sequestratcrs; see Daniell, Chancery Forms, 4th ed., p. 409. Should it be necessary to compel attornment, the sequestrators should apply by motion or summons for the order to attorn (*Wood* v. *Adams* (1780), 2 Dick. 576; *Rowley* v. *Ridley* (1784), 3 Swan. 306; *Goldsmith* v. *Goldsmith* (1846), 5 Hare, 123). Until such attornment no action can be brought against the tenant for

exists, the court may order an action to be brought in the name of the contemnor (*k*). Where the liability is admitted, the order to pay to the sequestrators will be made summarily (*l*).

Where money belonging to the contemnor is in court it will be ordered to be paid out (*m*). No order will be made against the Lords of the Treasury for payment to the sequestrators of money payable by them to the contemnor; in such case an injunction will be granted against the contemnor preventing him from collecting such sums, and the sequestrators will be authorised so to do (*n*).

Management of property by sequestrators.

158. The sequestrators, having taken possession so far as they are able to do so, are not to levy for the use of any person, but merely to detain and hold the property in their hands until the contempt is cleared and the court makes further order to the contrary (*o*), and therefore an order is required to regulate the rights of the parties (*p*). The sequestrators should apply to the court for any orders requisite to complete their seizure of the property, as above described, and for orders of management and the like (*q*). Without an order sequestrators have no power to enter into any contract, or to do any act on behalf of the contemnor or his estate, other than merely to detain the latter (*r*).

rent (*Rowley* v. *Ridley* (1784), 3 Swan. 306; *Johnson* v. *Chippindall* (1827), 2 Sim. 55; *Goldsmith* v. *Goldsmith* (1846), 5 Hare, 123).

(*k*) *Craig* v. *Craig*, [1896] P. 171, 173, 174, where all the cases in this and the next note are reviewed (*Simmonds* v. *Kinnaird* (*Lord*) (1799), 4 Ves. 735 *Johnson* v. *Chippindall, supra*; *Crispin* v. *Cumano* (1869), L. R. 1 P. & D. 622; *Manton* v. *Manton* (1870), 40 L. J. (CH.) 93; *Ward* v. *Booth* (1872), L. R. 14 Eq. 195; explained in *Re Slade, Slade* v. *Hulme* (1881), 18 Ch. D. 653).

(*l*) *Pelham* (*Lord*) v. *Newcastle* (*Duchess*) (*circa* 1713), 3 Swan. 290, n., as explained in *Johnson* v. *Chippindall, supra*, at p. 65; *Francklyn* v. *Colhoun* (1819), 3 Swan. 276; *Wilson* v. *Metcalfe* (1839), 1 Beav. 263; *Miller* v. *Huddlestone* (1882), 22 Ch. D. 233. In *Bayley* v. *Bayley* (1859), 29 L. J. (P. M. & A.) 72, a writ of assistance was granted at the applicant's risk against tenants who refused to pay the sequestrators; a writ of attachment was refused.

(*m*) *Claydon* v. *Finch* (1873), L. R. 15 Eq. 266; *Re Slade, Slade* v. *Hulme, supra*; and see *Knight* v. *Knight* (1856), 4 W. R. 771. In such case the application should be in the action in which the money was paid in (*ibid.*). Even money paid into court by the contemnor on an order for security for costs will be so ordered to be paid out (*Conn* v. *Garland* (1873), 9 Ch. App. 101). As to stock in court, see *Cowper* v. *Taylor* (1848), 16 Sim. 314.

(*n*) *Willcock* v. *Terrell* (1878), 3 Ex. D. 323, C. A. The Lords of the Treasury need not be served with such order (*M'Carthy* v. *Goold* (1810), 1 Ball & B. 387; and see also *Stone* v. *Lidderdale* (1795), 2 Anst. 533).

(*o*) *Wharam* v. *Broughton* (1748), 1 Ves. Sen. 180. There is no right acquired in the property sequestered by the party at whose instance the sequestration issued (*Burne* v. *Robinson* (1844), 7 I. Eq. R. 188).

(*p*) See, for an example, *Pelham* (*Lord*) v. *Harley* (*Lord*) (*circa* 1713), 3 Swan. 291, n.

(*q*) It was formerly the practice to require the return of the writ before proceeding to obtain any such order (*Yarroth* v. *Seys* (1720), Bunb. 62; *Pelham* (*Lord*) v. *Newcastle* (*Duchess*), *supra*; but it is not now the practice to file the return (*Goldsmith* v. *Goldsmith, supra*). On the return it appeared how much the sequestrators had obtained, and if insufficient, a new writ issued for sale of the chattels to raise the remainder due (*Yarroth* v. *Seys, supra*).

(*r*) Thus, management orders are necessary to enable them to let land (*Neale* v. *Bealing* (1744), 3 Swan. 304, n.; notice should be given to the contemnor of such an application (*ibid.*); as to the evidence required, see *Dunkley* v. *Scribnor*

SECT. 6. **Writ of Sequestration.**

The rights of trustees in bankruptcy as against persons issuing a writ of sequestration have been dealt with elsewhere (*s*); it is sufficient here to say that the execution is, in the case of a sequestration, not completed by sale except where, as hereafter stated, a sale has actually taken place (*t*).

Distress.

159. A sequestration does not prevent a distress upon the goods by the landlord (*a*), and the chattels of the contemnor may be removed from the premises (*b*). A landlord's claim for rent will, by order of the court, be paid out of the proceeds of a sequestration (*c*).

Registration of writ.

160. The writ should be registered in the same way as a writ of *elegit* wherever it affects land (*d*).

Sale of property.

161. No property sequestrated can be sold without leave of the court (*e*), and no land, except possibly leaseholds (*f*), can be ordered to be sold (*g*). When the contempt is for non-payment of money into court, parties interested therein are not creditors to whom lands have been delivered in execution, and therefore such lands cannot be sold under the Judgments Act, 1864 (*h*).

Sale of personal property.

162. Where the contempt is non-payment into court an order will be made for sale of personal property, payment of the proceeds into court, and payment of the costs of the sequestration (*i*); for example, such orders have been made as to farm produce (*k*),

(1815), 2 Madd. 443); to fell timber (*Dacres* (*Lady*) v. *Chute* (1683), 1 Vern. 160); or to settle a dilapidation claim with an outgoing tenant (*Re Burkill, Godfrey* v. *Burkill* (1873), Seton, Judgments and Orders, 6th ed., p. 456). A reference may be ordered to inquire whether an action for ejectment should be defended (*Crone* v. *Odell* (1827), 2 Mol. 389); and orders may be made for the redemption by sequestrators of mortgages upon the property (*Hamblyn* v. *Ley* (1743), 3 Swan. 301, n.).

(*s*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 62, 273.

(*t*) Under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 45; *Re Browne, Ex parte Hughes* (1871), L. R. 12 Eq. 137; *Re Hastings, Ex parte Brown* (1892), 9 Morr. 234. The person issuing the sequestration is a creditor, but not a secured creditor (*Re Hoare, Ex parte Nelson* (1880), 14 Ch. D. 41, C. A.), unless some express order making him so have been made (*Re Pollard, Ex parte Pollard*, [1903] 2 K. B. 41, C. A., *per* ROMER, L.J., at p. 48).

(*a*) *Dixon* v. *Smith* (1818), 1 Swan. 457.

(*b*) *Desbrough* v. *Crumbey* (1729), 1 Barn. (K. B.) 212.

(*c*) Where the landlord might have distrained (*Dixon* v. *Smith, supra*).

(*d*) See p. 70, *ante*.

(*e*) *Desbrough* v. *Crumbey, supra*.

(*f*) As to leaseholds, see *Shaw* v. *Wright* (1795), 3 Ves. 22; but see, for a case of sale, *Ellard* v. *Warren* (1681), 3 Rep. Ch. 48 [87].

(*g*) *Shaw* v. *Wright, supra;* and see *Sutton* v. *Stone* (1745), 1 Dick. 107, and next note.

(*h*) 27 & 28 Vict. c. 112, s. 4 (see p. 72, *ante*); *Johnson* v. *Burgess* (1873), L. R. 15 Eq. 398. It seems, upon the authority of an *ex parte* case, where the contemnor had left the country, that where the writ issues for the enforcement of a judgment in which the party issuing it could be considered as a creditor lands could be sold under the Act (*Re Rush* (1870), 22 L. T. 116).

(*i*) Seton, Judgments and Orders, 6th ed., p. 455. The application is made on summons or notice of motion served on the other side (*Mitchell* v. *Draper* (1803), 9 Ves. 208; *Ridgway* v. *Davis* (1837), 2 Jo. Ex. Ir. 507; *Turner* v. *Clifford*, [1870] W. N. 199), or *ex parte* where the contemnor has left the country (*Re Rush, supra*). Sequestrators on mesne process could not remove the goods seized by them (*Desbrough* v. *Crumbey, supra*, as reported *sub nom. Desbrow* v. *Crommie* (1729), Bunb. 272).

(*k*) *Dickinson* v. *Smith* (1813), 4 Madd. 177; *Dixon* v. *Smith, supra;*

household furniture (*l*), and a reversionary interest in stock standing to the credit of another cause (*m*).

SECT. 6. Writ of Sequestration.

Discharge of writ.

163. It is not the present practice for the return to the writ to be required (*n*). When the contemnor has cleared his contempt the sequestration will be ordered to be discharged or dissolved (*o*). Such an order obtained by a fraud on the court will be set aside (*p*). The order will direct the sequestrators to withdraw from possession upon payment of their costs, expenses, and proper allowances either out of funds in their hands or by the contemnor (*q*). If a receiver is appointed in the action to enforce an order in which the writ of sequestration is issued, it will discharge the writ (*r*). A writ irregularly issued will be discharged (*s*), though an irregularity may be waived by the contemnor by his giving directions to the sequestrators (*t*).

SECT. 7.—*Execution against Ecclesiastical Persons* (*a*).

Execution against beneficed clergymen

164. Where an execution against a beneficed clergyman of the Church of England has been returned by the sheriff (*b*) or by the sequestrators (*c*) to whom it was issued, with a statement that the debtor has no chattels or lay fee upon which execution can be had (*d*),

The practice was not to order sale on sequestration on mesne process (*Wilcocks* v. *Wilcocks* (1762), Amb. 421).

(*l*) *Cavil* v. *Smith* (1791), 3 Bro. C. C. 362; *Mitchell* v. *Draper* (1803), 9 Ves. 208.

(*m*) *Cowper* v. *Taylor* (1848), 16 Sim. 314.

(*n*) *Goldsmith* v. *Goldsmith* (1846), 5 Hare, 123. But the return may still be necessary where the contemnor is a beneficed clerk to found process directed to the bishop (*Allen* v. *Williams* (1854), 2 Sm. & G. 455).

(*o*) The return of the writ was held necessary before it could be discharged in *Anon.* (1718), Bunb. 31. At that time the practice was to file the return; see now *Goldsmith* v. *Goldsmith*, *supra*.

(*p*) *Ward* v. *Cornwall* (1871), 19 W. R. 1075; *Lewis* v. *Lewis* (1680), Cas. *temp.* Finch, 471.

(*q*) The application will be by summons or motion in the names of the sequestrators, not of their solicitor (*Crone* v. *Odell* (1824), 2 Mol. 355). The costs, charges, and expenses will be taxed as between party and party (*Re Shapland*, [1874] W. N. 202).

(*r*) *Shaw* v. *Wright* (1795), 3 Ves. 22.

(*s*) For example, under the old practice an order for a sequestration made before the return of an executed writ of attachment was held to be irregular and discharged (*Martin* v. *Kerridge* (1733), 3 P. Wms. 240; *Re Brown* (1868), 16 W. R. 962). It is doubtful whether the non-return of the writ of attachment would still constitute an objection.

(*t*) *Const* v. *Barr* (1826), 2 Russ. 161.

(*a*) See title ECCLESIASTICAL LAW, Vol. XI., pp. 616 *et seq.*

(*b*) See note (*p*), p. 59, notes (*w*) and (*c*), p. 65, and note (*n*), p. 66, *ante*.

(*c*) See note (*n*), *supra*.

(*d*) The following is the form of such a return by the sheriff:—The within-named C. D. has no goods or chattels nor any lay fee in my bailiwick, which I can seize or take, or pay, or deliver to the within-named A. B., or whereof I can cause to be made the moneys [*or* £] and interest within mentioned, or any part thereof, as I am within commanded; but I do hereby certify that the said C. D. is a beneficed clerk, to wit, rector of the rectory [*or* vicar of the vicarage, *or as the case may be*] and parish church of in my county, which said rectory [*or* vicarage] and parish church are within the diocese of the Right Reverend Father in God , by Divine permission Lord Bishop of [*or* within the peculiar jurisdiction

SECT. 7. Execution against Ecclesiastical Persons.

writs of *fieri facias de bonis ecclesiasticis* (*e*) or *sequestrari facias de bonis ecclesiasticis* (*f*) may issue to the bishop, who will act the part of a ay sheriff in their execution (*g*).

Part V.—Analogous Proceedings.

SECT. 1.—*Attachment of Debts.*

SUB-SECT. 1.—*In General.*

Attachment of debts.

165. Attachment of debts is a process by means of which a judgment creditor is enabled to reach money due to the judgment debtor (*h*) which is in the hands of a third person (*i*). For this purpose the ordinary methods of execution are inapplicable (*k*); but there is power to order the third person to pay to the judgment creditor the debt due from him to the judgment debtor, or as much of it as may be sufficient to satisfy the judgment creditor's claim (*a*). In this connection, the third person in whose hands is the moneys ought to be attached is called the garnishee, the requisite proceedings being known as garnishee proceedings, and the necessary order as a garnishee order (*b*).

When garnishee proceedings may be instituted.

166. Garnishee proceedings may be instituted (1) by any person who has obtained a judgment (*c*) or order (*d*) for the recovery

of the Very Reverend the Dean and Chapter of the Cathedral Church of St. and instituted to try them as ordinary, *as the case may be*].

(*e*) For the form of the writ, see R. S. C., App. H, No. 5; see also the notes to *Pack* v. *Tarpley* (1839), 9 Ad. & El. 468.

(*f*) For the form of the writ, see R. S. C. App. H, No. 7.

(*g*) *Walwyn* v. *Awberry* (1677), 1 Mod. Rep. 253, *per* NORTH, C.J., at p. 254. Thus, the bishop is liable for a false return (*Pickard* v. *Paiton* (1666), 1 Sid. 276). In ecclesiastical executions the priorities of writs date from the publications in the parish (*Legassicke* v. *Exeter* (*Bishop*), 1 Crompton's Practice, 351). The incumbent whose benefice is sequestered loses all enjoyment and control of the glebe lands (see *Powell* v. *Hibbert* (1850), 15 Q. B. 129). He cannot sue a tenant for an occupation rent (*ibid.*). The judgment creditor has no right to the return of the writ, but only of the amount levied (*Hart* v. *Vollans* (1832), 1 Dowl. 434), the whole of which, however, must be paid over by the sequestrator if necessary to satisfy the debt. No retention for future repairs may be made (*Dean* v. *Lempriere* (1857), 5 W. R. 560).

(*h*) Including his personal representatives as such (*Burton* v. *Roberts* (1860), 6 H. & N. 93; *Fowler* v. *Roberts* (1860), 2 Giff. 226; *Re Barnes, Harper* v. *Barnes* (1866), 36 L. J. (CH.) 63; compare *Horsam* v. *Turget* (1671), 1 Vent. 111; *Hewat* v. *Davenport* (1872), 21 W. R. 78).

(*i*) R. S. C., Ord. 45. For the mode of ascertaining what debts are due to the judgment debtor, see R. S. C., Ord. 42, r. 32.

(*k*) See p. 47, *ante*.

(*a*) R. S. C., Ord. 45, r. 1.

(*b*) *Ibid.*

(*c*) This process applies to (1) judgments against married women (*Holtby* v. *Hodgson* (1889), 24 Q. B. D. 103, C. A.); as to the effect of a restraint upon anticipation, see notes (*s*) and (*t*), p. 92, *post*; (2) judgments removed into the High Court from an inferior court; and (3) Scotch and Irish judgments extended to England (*Galbraith* v. *Grimshaw*, [1910] A. C. 508; and compare *Johnstone* v. *Bucknall*, [1898] 2 I. R. 499, where an English judgment was extended to Ireland).

(*d*) The word "order" was added by R. S. C., 1883, Ord. 45, r. 1.

or payment of money (*e*); (2) by an assignee of a judgment debt (*f*); (3) by the personal representatives of a deceased judgment creditor, who have been made parties to the action in which the judgment or order in question has been given or made (*g*); and (4), apparently, by any person who is otherwise entitled to sue out a writ of *fieri facias* (*h*).

SUB-SECT. 2.—*Debts which may or may not be Attached.*

167. All (*i*) debts owing or accruing from any person (*k*) to the judgment debtor (*l*), whether they are legal or equitable (*m*), may be attached (*n*). What debts attachable.

This includes an order for costs, though application should first be made for payment (*Nott* v. *Sands*, [1883] W. N. 74; compare *Whittaker* v. *Whittaker* (1881), 7 P. D. 15; and see *Pritchett* v. *English and Colonial Syndicate*, [1899] 2 Q. B. 428, C. A.; *Hartley* v. *Shemwell*, *Marples* v. *Hartley* (1861), 1 B. & S. 1).

(*e*) The judgment or order must be for a liquidated sum, but if it includes costs to be taxed, proceedings may be taken before the costs are taxed (compare *Holtby* v. *Hodgson* (1889), 24 Q. B. D. 103, C. A.). The judgment creditor must be entitled to enforce immediate payment of his judgment (*Kennett* v. *Westminster Improvement Commissioners* (1855), 11 Exch. 349; *Dresser* v. *Johns* (1859), 6 C. B. (N. S.) 429; *Jones* v. *Thompson* (1858), E. B. & E. 63; *Shaw* v. *Shaw* (1868), 18 L. T. 420). Judgments or orders for payment of money into court cannot be enforced by garnishee proceedings (*Re Greer*, *Napper* v. *Fanshawe*, [1895] 2 Ch. 217).

(*f*) *Goodman* v. *Robinson* (1886), 18 Q. B. D. 332. Leave will be necessary; see p. 7, *ante*; see also *Forster* v. *Baker*, [1910] 2 K. B. 636, C. A.

(*g*) *Baynard* v. *Simmons* (1855), 5 E. & B. 59. Leave will be necessary; see p. 7, *ante*.

(*h*) *Jones* v. *Jenner* (1856), 25 L. J. (EX.) 319, *per* BRAMWELL, B. Hence it would seem that a creditor under a judgment in the High Court who has obtained an order from a county court judge for payment of his debt by instalments under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5 (see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 340), cannot take proceedings whilst the order remains in force (*Montgomery & Co.* v. *De Bulmes*, [1898] 2 Q. B. 420, 424, C. A., approving *Jones* v. *Jenner*, *supra*).

(*i*) Money belonging to the judgment debtor which the garnishee has found may be attached (*Tross* v. *Michell* (1590), Cro. Eliz. 172). For the exceptions, see p. 94, *post*.

(*k*) Including a firm carrying on business within the jurisdiction (R. S. C., Ord. 48A, r. 9); and a corporation (R. S. C., Ord. 71, r. 1). On a joint judgment, debts belonging to one or more of the judgment debtors may be attached (*Miller* v. *Mynn* (1859), 1 E. & E. 1075), except where the joint judgment debtors are husband and wife and the effect of the attachment would be to defeat a restraint upon anticipation (*Chapman* v. *Biggs* (1883), 11 Q. B. D. 27). Where the debtor to the judgment debtor is dead, and garnishee proceedings are taken against his executors, the proceedings should show on the face of them that they are taken against the executors as such (*Stevens* v. *Phelips* (1875), 10 Ch. App. 417). So judgment against executors as such may be enforced by attaching debts due to the estate, even though a decree for administration has been made (*Burton* v. *Roberts* (1860), 6 H. & N. 93; and compare *Fowler* v. *Roberts* (1860), 2 Giff. 226; *Re Barnes*, *Harper* v. *Barnes* (1866), 36 L. J. (CH.) 63).

(*l*) Debts due to the judgment debtor jointly with another cannot be attached (*Macdonald* v. *Tacquah Gold Mines Co.* (1884), 13 Q. B. D. 535, C. A.).

(*m*) *Wilson* v. *Dundas and Stevenson*, [1875] W. N. 232; *Re Cowans' Estate*, *Rapier* v. *Wright* (1880), 14 Ch. D. 638; *Webb* v. *Stenton* (1883), 11 Q. B. D. 518, C. A.

(*n*) R. S. C., Ord. 45, r. 1.

SECT. 1. Attachment of Debts.

168. To be capable of attachment, there must be in existence, at the date when the attachment becomes operative (*o*), something which the law recognises as a debt (*p*), and not merely something which may or may not become a debt (*q*). Thus, where the existence of a debt depends upon the performance of a condition, there is no attachable debt (*r*) until the condition has been duly performed (*s*). Even an existing right under which something is accruing that will probably become a debt at some future date is not sufficient, notwithstanding that the amount to become due is capable of being calculated with precision (*t*). As soon, however, as the debt has arisen it can be attached (*a*).

So long as there is a debt in existence it is not necessary that it should be immediately payable. Thus, where an existing debt is payable by future instalments, the garnishee order may be made to become operative as and when each instalment becomes due (*b*).

Must be sum certain.

169. The debt must be a sum certain, and therefore a claim for unliquidated damages cannot be attached until the amount of the damages has been ascertained (*c*). The garnishee may, however, by failing to dispute his liability where the claim against him is one for unliquidated damages only, preclude himself from subsequently denying that there was a debt due from himself to the judgment debtor upon which garnishee proceedings could validly be taken (*d*).

(*o*) See p. 96, *post*.

(*p*) *Webb* v. *Stenton* (1883), 11 Q. B. D. 518, C. A., *per* BRETT, M.R., at p. 522; compare *Macdonald* v. *Hollister* (1855), 3 W. R. 522 (legacy not attachable).

(*q*) *Webb* v. *Stenton*, *supra*, at p. 524; *Howell* v. *Metropolitan District Rail. Co.* (1881), 19 Ch. D. 508; *Horsley* v. *Cox* (1869), 4 Ch. App. 92; *Vyse* v. *Brown* (1884), 13 Q. B. D. 199.

(*r*) *Richardson* v. *Elmit* (1876), 2 C. P. D. 9; *Howell* v. *Metropolitan District Rail. Co.*, *supra* (both cases of compulsory purchase of land where compensation is not payable until the conveyance is completed; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 83).

(*s*) *Owens* v. *Shield* (1884), Cab. & El. 356.

(*t*) *Webb* v. *Stenton*, *supra* (future income of *cestui que trust*); *Bolitho & Co., Ltd.* v. *Gidley*, [1905] A. C. 98, approving *Whiteley* v. *Edwards*, [1896] 2 Q. B. 48, C. A.; *Galmoye* v. *Cowan and Brown* (1889), 58 L. J. (CH.) 769 (all cases of income of married women restrained from anticipation due after judgment); *Barnett* v. *Eastman* (1898), 67 L. J. (Q. B.) 517 (rent not yet due); compare *Jones* v. *Thompson* (1858), E. B. & E. 63.

(*a*) *Hood Barrs* v. *Heriot*, [1896] A. C. 174 (arrears of married woman's income, though restrained from anticipation); *Mitchell* v. *Lee* (1867), L. R. 2 Q. B. 259, 263 (rent due).

(*b*) *Tapp* v. *Jones* (1875), L. R. 10 Q. B. 591; *Re Cowans' Estate, Rapier* v. *Wright* (1880), 14 Ch. D. 638. The possibility that before the day of payment arises the garnishee may become entitled to refuse payment is not a sufficient reason for refusing to make the order (*Sparks* v. *Younge* (1858), 8 I. C. L. R. 251).

(*c*) *Randall* v. *Lithgow* (1884), 12 Q. B. D. 525; *Johnson* v. *Diamond* (1855), 11 Exch. 73; *Dresser* v. *Johns* (1859), 6 C. B. (N. S.) 429; *Jones* v. *Thompson*, *supra*; *Shaw* v. *Shaw* (1868), 18 L. T. 420. But costs ordered to be taxed and paid to the judgment debtor may be attached before taxation (*Fitzpatrick* v. *Waring* (1883), 13 L. R. Ir. 2).

(*d*) *Randall* v. *Lithgow*, *supra*; *Vinall* v. *De Pass*, [1892] A. C. 90; see *Daniel* v. *M'Carthy* (1857), 7 I. C. L. R. 261.

Must be enforceable by debtor.

170. The debt must be one which the judgment debtor could himself (*e*) enforce (*f*) for his own benefit (*g*); for the creditor acquires no larger rights than those of the debtor (*h*). If, therefore, the debt is due to the judgment debtor in the capacity of a trustee only (*i*), or if he has parted with the debt by assigning it (*k*), even though he has reserved power to himself to revoke the assignment (*l*), it cannot be attached (*m*).

Nor can a debt be attached where the garnishee has already given a cheque to the judgment debtor in payment, until the cheque has been stopped (*n*) or dishonoured (*o*), and the mere fact that the cheque has not been presented is not sufficient (*p*). When the debt is secured by a promissory note, it is not attachable until the note falls due (*q*).

Relation of debtor and creditor must exist.

171. Money in the hands of a third person, where the relation of debtor and creditor does not exist between him and the judgment debtor, cannot be attached (*r*). Garnishee proceedings cannot therefore be taken in respect of dividends payable to the judgment debtor by a trustee in bankruptcy (*s*), or by the liquidator of a company (*t*), nor in respect of money which has been attached at the

(*e*) Therefore a debt due to the judgment debtor jointly with another cannot be attached (*Macdonald* v. *Tacquah Gold Mines Co.* (1884), 13 Q. B. D. 535, C. A.; *Beasley* v. *Roney*, [1891] 1 Q. B. 509).

(*f*) *Webster* v. *Webster* (1862), 31 Beav. 393.

(*g*) *Bouch* v. *Sevenoaks Rail. Co.* (1879), 4 Ex. D. 133; compare *Chapman* v. *Callis* (1862), 6 L. T. 282; *Westoby* v. *Day* (1853), 2 E. & B. 605.

(*h*) See p. 100, *post*.

(*i*) *Hancock* v. *Smith* (1889), 41 Ch. D. 456, C. A; and see *Re Stenning*, *Wood* v. *Stenning*, [1895] 2 Ch. 433; *Westoby* v. *Day*, *supra*.

(*k*) *Hirsch* v. *Coates* (1856), 18 C. B. 757; *Wise* v. *Birkenshaw* (1860), 29 L. J. (EX.) 240; *Davis* v. *Freethy* (1890), 24 Q. B. D. 519, C. A. (judgment debt); compare *Robinson* v. *Nesbitt* (1868), L. R. 3 C. P. 264; *Dumbell* v. *Isle of Man Rail. Co.* (1880), 42 L. T. 745, P. C.; *Yates* v. *Terry*, [1902] 1 K. B. 527, C. A. If the assignment was executed by the assignor before the date of the garnishee proceedings, its execution afterwards by the assignee relates back to the date of execution by the assignor, and renders it valid as against the judgment creditor of the assignor (*Edmunds* v. *Edmunds*, [1904] P. 362; compare *Pickering* v. *Ilfracombe Rail. Co.* (1868), L. R. 3 C. P. 235).

(*l*) *Roberts* v. *Jones* (1892), 61 L. J. (Q. B.) 523; *Runtz* v. *Longbourne* (1892), 8 T. L. R. 568. But the assignment may be set aside as void under stat. (1571) 13 Eliz. c. 5 (*Edmunds* v. *Edmunds*, *supra*).

(*m*) As to the effect of a charge created by the judgment debtor, see p. 97, *post*.

(*n*) *Cohen* v. *Hale* (1878), 3 Q. B. D. 371.

(*o*) *Elwell* v. *Jackson* (1885), 1 T. L. R. 454, C. A.

(*p*) *Ibid.* The garnishee is not bound to stop the cheque (*ibid.*; *Edmunds* v. *Edmunds*, *supra*).

(*q*) *Pyne* v. *Kinna* (1877), 11 I. R. C. L. 40; see *Hyam* v. *Freeman* (1890), 35 Sol. Jo. 87, where the order was made, but execution was not allowed to issue till the note matured, the judgment debtor being meanwhile restrained from negotiating it.

(*r*) *Webb* v. *Stenton* (1883), 11 Q. B. D. 518, 526, C. A.

(*s*) *Prout* v. *Gregory* (1889), 24 Q. B. D. 281; *Re Greensill* (1872), L. R. 8 C. P. 24; *Boyse* v. *Simpson* (1859), 8 I. C. L. R. 523; *Gilmour* v. *Simpson* (1859), 8 I. C. L. R., Appendix, XXXVIII.; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 238.

(*t*) *Mack* v. *Ward*, [1884] W. N. 16; compare *Spence* v. *Coleman*, [1901] 2 K. B. 199, C. A.; but see *Klauber* v. *Weill* (1901), 17 T. L. R. 344, C. A., where, however, the liquidator did not object to the order.

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suit of the judgment debtor (*a*), or money which has been ordered to be paid into court (*b*), or which is in the hands of an officer of the court (*c*), other than a sheriff (*d*) or receiver (*e*).

Salaries, wages, pensions etc.

172. Though a salary or other periodic payment of a similar nature (*f*) is, as a general rule, attachable when it becomes a debt but not before (*g*), there are certain payments of this class which are protected from attachment. These payments are (1) wages of seamen (*h*), or of servants, labourers, or workmen (*i*); (2) pay of officers in the public service (*k*), including officers of the customs (*l*); (3) certain pensions payable out of public funds (*m*), including

(*a*) *Cooper* v. *Lawson* (1890), 6 T. L. R. 34.

(*b*) *Re Greer, Napper* v. *Fanshawe*, [1895] 2 Ch. 217; *Howell* v. *Metropolitan District Rail. Co.* (1881), 19 Ch. D. 508; *Stevens* v. *Phelips* (1875), 10 Ch. App. 417; *Adams* v. *Gillen* (1875), 9 I. R. C. L. 148; *Grant* v. *Harding* (1767), 4 Term Rep. 313, n.; *Coppell* v. *Smith* (1791), 4 Term Rep. 312; compare *Dolphen* v. *Layton* (1879), 4 C. P. D. 130 (payment into county court).

(*c*) *Llewellyn* v. *Rowland, Ex parte Wright & Son* (1907), 97 L. T. 433 (money in hands of county court registrar); *Re Greensill* (1872), L. R. 8 C. P. 24 (surplus assets of bankrupt in hands of official receiver); compare *Spence* v. *Coleman*, [1901] 2 K. B. 199, C. A. (unclaimed share of company's assets paid into companies liquidation account), and contrast *Re Warwick and Worcester Rail. Co., Prichard's Claim, Ex parte Turner, Ex parte Smith* (1860), 2 De G. F. & J. 354, C. A.; *Re Jervis* (1885), 1 T. L. R. 306; also reported, *sub nom. Bice* v. *Jarvis* (1885), 49 J. P. 264 (money in hands of police found on prisoner).

(*d*) *Re Greer, Napper* v. *Fanshawe, supra; Murray* v. *Simpson* (1858), 8 I. C. L. R., Appendix, xlv.; *O'Neill* v. *Cunningham* (1872), 6 I. R. C. L. 503. As to the effect of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11 (2), see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 274. Money, however, which the sheriff holds as an officer of the court to apply as it orders cannot be attached (*Williams* v. *Reeves* (1861), 12 I. Ch. R. 173).

(*e*) *Re Cowans' Estate, Rapier* v. *Wright* (1880), 14 Ch. D. 638; and see *Webb* v. *Stenton* (1883), 11 Q. B. D. 519, 526, C. A., and *De Winton* v. *Brecon Corporation* (No. 2) (1860), 28 Beav. 200.

(*f*) A garnishee order attaching accrued income in the hands of trustees does not operate as a forfeiture where by the terms of the trust the income is given until the recipient attempts to charge or anticipate it (*Re Greenwood, Sutcliffe* v. *Gledhill*, [1901] 1 Ch. 887, following *Sutton, Carden & Co.* v. *Goodrich* (1899), 80 L. T. 765; and dissenting from *Bates* v. *Bates*, [1884] W. N. 129; see also *Re Stulz's Trusts* (1853), 4 De G. M. & G. 404, C. A.; *Re Sampson, Sampson* v. *Sampson*, [1896] 1 Ch. 630).

(*g*) *Jones* v. *Thompson* (1858), E. B. & E. 63; *Hall* v. *Pritchett* (1877), 3 Q. B. D. 215 (medical officer); see, however, *Nash* v. *Pease* (1878), 47 L. J. (Q. B.) 766, where an annuity was held (wrongly, it is submitted) attachable. But fees payable to a public vaccinator under contract are attachable as soon as the work is performed, although the term of payment may not have arrived (*Edmunds* v. *Edmunds*, [1904] P. 362).

(*h*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 163.

(*i*) Wages Attachment Abolition Act, 1870 (33 & 34 Vict. c. 30), s. 1, which applies only to the specified classes of persons, and not, for example, to a clerk (*Marks* v. *Booth* (1891), 90 L. T. Jo. 302), or secretary (*Gordon* v. *Jennings* (1882), 9 Q. B. D. 45) of a limited company. This Act apparently applies only to inferior courts (*Booth* v. *Trail* (1883), 12 Q. B. D. 8).

(*k*) See title CHOSES IN ACTION, Vol. IV., p. 400.

(*l*) Revenue, Friendly Societies, and National Debt Act, 1882 (45 & 46 Vict. c. 72), s. 3.

(*m*) See title CHOSES IN ACTION, Vol. IV., pp. 400 *et seq.* The privilege, however, extends only to the pension as such. Where, therefore, the amount of the pension due has been paid into a bank to the pensioner's account, it may be attached (*Jones & Co.* v. *Coventry*, [1909] 2 K. B. 1029), though a mere

police (*n*) and old age pensions (*o*); and (4) maintenance due from a husband to his divorced wife (*p*).

SUB-SECT. 3.—*Procedure.*

(1) *To the making of the Order Nisi.*

When proceedings may be taken.

173. Garnishee proceedings may be taken at any time after the judgment has been signed (*q*), or the order drawn up or otherwise completed (*r*). Leave is unnecessary, even though a period of more than six years has elapsed since the date of the judgment or order (*s*).

Application for order *nisi*

174. Application is made in the first instance to a master for an order *nisi* attaching the debt to answer the judgment or order and calling upon the garnishee to appear on a day named in the order and show cause why he should not pay the debt alleged to be due from him to the judgment creditor (*t*). The application is made *ex parte*, no notice either to the judgment debtor or to the garnishee being necessary (*a*). It must be supported by an affidavit made by the judgment creditor (*b*), or by his solicitor, and stating (1) that judgment has been recovered or an order made; (2) that it is still unsatisfied either wholly or in part: in the latter case the amount remaining unpaid must be set out; (3) that the garnishee is indebted to the judgment debtor (*c*); and (4) that the garnishee is within the jurisdiction (*d*).

crediting of the pensioner's account with the amount by the bank is not sufficient (*ibid.*); and where the pension is commuted, the commutation money is apparently attachable (*Crowe* v. *Price* (1889), 22 Q. B. D. 429, C. A.).

(*n*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 7 (1).

(*o*) Old Age Pensions Act, 1908 (8 Edw. 7, c. 40), s. 6.

(*p*) *Re Robinson* (1884), 27 Ch. D. 160, C. A.; *Watkins* v. *Watkins*, [1896] P. 222, C. A.; *Paquine* v. *Snary*, [1909] 1 K. B. 688, C. A.

(*q*) A judgment pronounced in court takes effect not from the date of entry, but from the date of its being pronounced (*Holtby* v. *Hodgson* (1889), 24 Q. B. D. 103, C. A.).

(*r*) As to the date from which an order becomes effective, see title JUDGMENTS AND ORDERS.

(*s*) *Fellows* v. *Thornton* (1884), 14 Q. B. D. 335.

(*t*) R. S. C., Ord. 45, r. 1. See the form, App. K, No. 39.

(*a*) *Ibid.*

(*b*) When the judgment creditor is a limited company, the affidavit may be made by an officer of the company (——*Bank, Ltd.* v. *E*—— (1887), 32 Sol. Jo. 154 (assistant manager, who had, however, to file an affidavit showing his authority); *Limmer Asphalte Paving Co.* v. *F*—— (1888), 32 Sol. Jo. 439 (secretary)).

(*c*) An affidavit based on information and belief is sufficient (*Vinall* v. *De Pass*, [1892] A. C. 90, affirming *De Pass* v. *Capital and Industries Corporation*, [1891] 1 Q. B. 216, C. A.; *Coren* v. *Barne* (1889), 22 Q. B. D. 249), provided the sources of information or grounds of belief are stated (*Re Young (J. L.) Manufacturing Co., Ltd., Young* v. *Young (J. L.) Manufacturing Co., Ltd.*, [1900] 2 Ch. 753, C. A.; *Lumley* v. *Osborne*, [1901] 1 K. B. 532, C. A.). It is not necessary to identify the debt alleged to be due (*De Pass* v. *Capital and Industries Corporation, supra*), or to specify its amount (*Lucy* v. *Wood*, [1884] W. N. 58). Where the judgment creditor has no information and no means of obtaining information, he may apply for the appointment of a receiver instead of taking garnishee proceedings (*Goldschmidt* v. *Oberrheinische Metallwerke*, [1906] 1 K. B. 373, C. A.).

(*d*) R. S. C., Ord. 45, r. 1; *Martyn* v. *Kelly* (1871), 5 I. R. C. L. 404. Garnishee proceedings may be taken against a firm carrying on business within the jurisdiction, though one or more of the partners may be resident abroad (R. S. C., Ord. 48A, r. 9); see title PARTNERSHIP.

SECT. 1. Attachment of Debts.

The making of the order *nisi* is within the master's discretion (*e*).

(ii.) *Effect of the Order Nisi.*

Service of order.

175. The order *nisi* gives no rights to the judgment creditor until it has been served on the garnishee (*f*). Until service any disposition of the debt made by the judgment debtor takes priority over the order (*g*), and payment to the judgment debtor by the garnishee will discharge him (*h*).

The order must be served upon the garnishee (*i*), or his solicitor, and, unless otherwise ordered, upon the judgment debtor and his solicitor (*k*), at least seven days before the day named in the order for showing cause (*l*).

Effect of service.

176. The service of the order binds the debts specified in the hands of the garnishee (*m*), provided that they are debts capable of being attached at that date (*n*). The judgment creditor does not thereby become a creditor of the garnishee in respect of such debts (*o*); but he at once (*p*) acquires a right over them (*q*), entitling him to prevent the garnishee from paying his creditor (*r*),

(*e*) *Wise* v. *Birkenshaw* (1860), 29 L. J. (EX.) 240; see *Leese* v. *Martin* (1873), L. R. 17 Eq. 224; *Martin* v. *Nadel*, [1906] 2 K. B. 26, C. A.

(*f*) *Hamer* v. *Gles*, *Giles* v. *Hamer* (1879), 11 Ch. D. 942; *Re Stanhope Silkstone Collieries Co.* (1879), 11 Ch. D. 160, C. A.

(*g*) *Hamer* v. *Giles*, *Giles* v. *Hamer*, *supra*; *Dallow* v. *Garrold* (1884), 14 Q. B. D. 543.

(*h*) *Cooper* v. *Brayne* (1858), 27 L. J. (EX.) 446.

(*i*) The master may direct notice of the order to be given to the garnishee where service cannot be effected (R. S. C., Ord. 45, r. 2).

(*k*) Service on the judgment debtor may be made either (1) at the address for service if he has appeared in the action and given an address for service, or (2) on his solicitor, if he has appeared by solicitor, or (3) if there has been no appearance, at his usual residence or place of business, or in such other manner as the master shall direct (R. S. C., Ord. 45, r. 1). As to the mode of service, see R. S. C., Ord. 67, r. 2, and title PRACTICE AND PROCEDURE.

(*l*) R. S. C., Ord. 45, r. 1.

(*m*) *Ibid.*, r. 2. Money paid into court under a judgment is not in the hands of the garnishee (*Howell* v. *Metropolitan District Rail. Co.* (1881), 19 Ch. D. 508). The surplus in the hands of a mortgagee who has realised his security cannot be attached by a garnishee order against the mortgagor obtained before the sale by a judgment creditor of a subsequent mortgagee; it is necessary to obtain a garnishee order after the sale against the first mortgagee (*Chatterton* v. *Watney* (1881), 16 Ch. D. 378). Unless the order *nisi* correctly designates the debtor and the account which he has with a bank, the bank on which it is served need not retain the money of the customer which the order is intended to attach (*Koch* v. *Mineral Oil Syndicate* (1910), 54 Sol. Jo. 600, C. A.).

(*n*) See p. 92, *ante*.

(*o*) *Re Combined Weighing and Advertising Machine Co.* (1889), 43 Ch. D. 99, C. A., followed in *Norton* v. *Yates*, [1906] 1 K. B. 112. The service of an order *nisi* upon a company, though, in the event of a subsequent winding-up, placing the judgment creditor in the position of a secured creditor as against the liquidator (*Re National United Investment Corporation*, [1901] 1 Ch. 950), does not entitle the creditor, even after the order has been made absolute, to present a winding-up petition against the company, if it does not obey the order (*Re Combined Weighing and Advertising Machine Co.*, *supra*, at p. 104).

(*p*) *Cairney* v. *Back*, [1906] 2 K. B. 746.

(*q*) *Re Combined Weighing and Advertising Machine Co.*, *supra*; *Galbraith* v. *Grimshaw and Baxter*, [1910] A. C. 508; and see *Chatterton* v. *Watney* (1881), 17 Ch. D. 259, C. A.

(*r*) *Re Watt*, *Ex parte Joselyne* (1878), 8 Ch. D. 327, C. A., as explained in *Re Combined Weighing and Advertising Machine Co.*, *supra*.

though he cannot, until the order is made absolute (*s*), insist on payment to himself.

The service of the order does not, however, when the debt specified is a judgment debt, operate as a stay of execution (*a*), nor does it prevent a bankruptcy notice already served on the garnishee from taking effect (*b*). Nor will the service of the order give the judgment creditor priority over equitable charges (*c*) existing at the date of service, even when no notice has been given (*d*), nor over existing liens (*e*), including the garnishee's own lien (*f*). For the order only binds that part of the debt with which the judgment debtor can deal honestly, properly, and without violation of the rights of third persons at the time when the order is served (*g*).

(*s*) For a payment to the judgment creditor under the order *nisi* alone would be a voluntary payment (*London Corporation* v. *London Joint Stock Bank* (1881), 6 App. Cas. 393, *per* Lord BLACKBURN, at p. 415), and therefore would not of itself discharge the garnishee; see p. 100, *post*. Such a payment has been held to be cause against the order being made absolute (*O'Donovan* v. *Dillon* (1889), 24 L. R. Ir. 442).

(*a*) *Re H. B.*, [1904] 1 K. B. 94, 97, C. A.; *Cronmire* v. *MacColla* (1893), 9 T. L. R. 549, C. A. Hence payment to the sheriff who has levied execution will discharge the garnishee (*Turnbull* v. *Robertson* (1878), 47 L. J. (Q. B.) 294).

(*b*) *Re H. B., supra*; *Re Curtoys, Ex parte Pillers* (1881), 17 Ch. D. 653, C. A.; *Re Dennis, Ex parte Dennis* (1888), 60 L. T. 348, C. A., where the garnishee order was not made absolute till the time for complying with the notice had expired; compare p. 101, *post*. As to the effect of a subsequent bankruptcy, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 271 *et seq.*; *Galbraith* v. *Grimshaw and Baxter*, [1910] 1 K. B. 339, C. A., affirmed [1910] A. C. 508; *Re Webster*, [1907] 1 K. B. 623.

(*c*) *Badeley* v. *Consolidated Bank* (1888), 38 Ch. D. 238, C. A.; see also *Re London Pressed Hinge Co., Ltd., Campbell* v. *London Pressed Hinged Co., Ltd.*, [1905] 1 Ch. 576, 581; *Cole* v. *Eley*, [1894] 2 Q. B. 180; *Levene* v. *Maton* (1907), 51 Sol. Jo. 532. Similarly, a floating charge upon the assets of a company secured by debentures takes priority, though the receiver and manager is appointed after service of the order *nisi* (*Norton* v. *Yates*, [1906] 1 K. B. 112), or even after the order has been made absolute (*Cairney* v. *Back*, [1906] 2 K. B. 746); compare *Geisse* v. *Taylor*, [1905] 2 K. B. 658, where the debenture was issued after the order had been made absolute. Payment to the judgment creditor by the garnishee, though with notice of the debenture-holder's claim, will, however, be a good discharge to the garnishee, if no receiver has been appointed, and nothing has been done to make the charge active (*Robson* v. *Smith*, [1895] 2 Ch. 118, as explained in *Norton* v. *Yates, supra*, at p. 123; compare *Cairney* v *Back, supra*, at p. 752; *Re United English and Scottish Assurance Co., Ex parte Hawkins* (1868), 3 Ch. App. 787; *Robinson* v. *Burnell's Vienna Bakery Co.*, [1904] 2 K. B. 624); and in such a case the order may be made absolute (*Evans* v. *Rival Granite Quarry Co., Ltd.* (1910), 26 T. L. R. 509, C. A.). A charging order obtained under the Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28, takes priority, though obtained subsequently (*Dallow* v. *Garrold* (1884), 14 Q. B. D. 543).

(*d*) *Badeley* v. *Consolidated Bank, supra*; *Hirsch* v. *Coates* (1856), 18 C. B. 757.

(*e*) *Sympson* v. *Prothero* (1857), 26 L. J. (CH.) 671; *Eisdell* v. *Coningham* (1859), 28 L. J. (EX.) 213; *Hamer* v. *Giles*, *Giles* v. *Hamer* (1879), 11 Ch. D. 942; *Faithfull* v. *Ewen* (1878), 7 Ch. D. 495, C. A.; *Cormick* v. *Ronayne* (1888), 22 L. R. Ir. 140; *Burchall* v. *Pugin* (1875), L. R. 10 C. P. 397; *Shippey* v. *Grey* (1880), 49 L. J. (Q. B.) 524, C. A. (all cases of solicitor's lien); *The Jeff Davis* (1867), L. R. 2 A. & E. 1; *The Leader* (1868), L. R. 2 A. & E. 314 (both cases of proctor's lien); *Webster* v. *Webster* (1862), 31 Beav. 393 (army agent's lien). A solicitor's general lien does not, however, take priority (*Hough* v. *Edwards* (1856), 1 H. & N. 171).

(*f*) *Nathan* v. *Giles* (1814), 5 Taunt. 558; *Caila* v. *Elgood* (1822), 2 Dow. & Ry. (K. B.) 193.

(*g*) *Badeley* v. *Consolidated Bank, supra*; *Re General Horticultural Co., Ex*

SECT. 1. Attachment of Debts.

Effect of order.

177. Where, by the order *nisi*, all debts owing or accruing from the garnishee to the judgment debtor are attached, all the funds in the hands of the garnishee belonging to the judgment debtor (*h*) are attached, although their amount may be largely in excess of the amount of the judgment debt (*i*), unless the order is restricted in its operation to such amount as will satisfy the judgment debt (*k*).

(iii.) *From service of the Order nisi to the making of the Order Absolute.*

Proceedings after service.

178. Where the garnishee does not dispute the debt due or claimed to be due from him to the judgment debtor, he may (1) pay into court forthwith the whole amount of the debt or an amount equal to the judgment debt, as the case may be (*l*); or (2) appear on the day named in the order *nisi* and admit the debt; or (3) fail to appear (*m*). The order will then be made absolute (*n*).

Appearance.

179. If the garnishee disputes his liability (*o*), he must appear (*p*) on the day named in the order *nisi* to show cause against it (*q*). In ordinary cases he need not in the first instance produce any affidavit. If, however, the judgment creditor expressly desires it, the garnishee may be required to make an affidavit, and such affidavit should not be confined to denying the existence of the debt or debts alleged to be due, but should state specifically whether he is indebted to the judgment debtor at all, and if so, to what amount (*r*). He is entitled to set off any debt due to him from the judgment debtor at the date when the order *nisi* was

parte Whitehouse (1886), 32 Ch. D. 512, approved in *Davis* v. *Freethy* (1890), 24 Q. B. D. 519, C. A.; *Dallow* v. *Garrold* (1884), 14 Q. B. D. 543; compare *Jersey (Earl)* v. *Uxbridge Union Rural Sanitary Authority* (1891), 64 L. T. 858, 859 (retrospective poor rate); *Hutt* v. *Shaw* (1887), 3 T. L. R. 354, C. A. (cover money, when the transaction was still open); contrast *Stumore* v. *Campbell & Co.*, [1892] 1 Q. B. 314, C. A., where a deposit was held attachable, its purpose having failed.

(*h*) As to the effect of the fund being a trust fund, or of the existence of a charge upon it, see p. 93, *ante*.

(*i*) *Rogers* v. *Whiteley*, [1892] A. C. 118.

(*k*) *Ibid.*, *per* Lord WATSON, at p. 122, and *per* Lord MORRIS, at p. 123. As to the power to attach part of a debt, see *Anon.* (1612), Godb. 195; *Johnson* v. *Diamond* (1855), 25 L. T. (o. s.) 85. When the amount of the debt due from the garnishee is in excess of the judgment debt, an assignment of the excess by the judgment debtor after service of the order *nisi* on the garnishee is valid as against a second judgment creditor who serves a garnishee order *nisi* on the garnishee after the assignment (*Yates* v. *Terry*, [1902] 1 K. B. 527, C. A.). If after the order *nisi* has been served the judgment debtor becomes bankrupt, the judgment creditor is entitled to receive the debt in priority to the trustee in bankruptcy (*Galbraith* v. *Grimshaw and Baxter*, [1910] A. C. 508).

(*l*) He should not at this stage of the proceedings make any payment to the judgment creditor; see p. 100, *post*. As to the effect upon such payment of the judgment debtor's subsequent bankruptcy, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 185.

(*m*) Failure to appear operates as an admission that the amount claimed is due (*Randall* v. *Lithgow* (1884), 12 Q. B. D. 525).

(*n*) R. S. C., Ord. 45, r. 3.

(*o*) The same procedure will be applicable where the garnishee admits liability as to part of the amount claimed and disputes it as to the rest.

(*p*) The judgment debtor may also, it seems, appear to give information by affidavit (*Lovely* v. *White* (1883), 12 L. R. Ir. 381).

(*q*) R. S. C., Ord. 45, r. 3. The garnishee must show some real ground for disputing his liability (*Newman* v. *Rook* (1858), 4 C. B. (N. S.) 434).

(*r*) *Vinall* v. *De Pass*, [1892] A. C. 90.

served upon him (*s*), but not debts accruing due afterwards (*t*). He cannot, however, set off a debt due to him from the judgment creditor (*u*).

If the garnishee sets up a *primâ facie* case, the master before making the order absolute may (1) direct an issue to try the question whether at the time when the order *nisi* was served upon the garnishee he was indebted to the judgment debtor (*w*); or (2) order a special case to be stated, where the question is one of law (*x*); or (3) refer the matter to a master (*a*).

Where the garnishee suggests that some other person than the judgment debtor is entitled to the debt which is sought to be attached (*b*), or has a lien (*c*), or charge (*d*) upon it, the master may order such person to appear and state the nature and particulars of his claim (*e*).

Similarly any other person interested may be ordered or allowed to appear (*f*). After hearing the allegations of any person ordered or allowed to appear, or on his failure to appear, the master may (1) make the order absolute; or (2) direct an issue or question to be tried or determined (*g*); or (3) make such other order as he thinks fit, upon such terms as to the lien or charge of such person and as to costs as he thinks just and reasonable (*h*). An order will not be made where, in the circumstances of the case, the garnishee might be in danger of having to pay the debt over again (*i*).

(*s*) *Tapp* v. *Jones* (1875), L. R. 10 Q. B. 591; *Rymill* v. *Wandsworth District Board* (1883), Cab. & El. 92; compare *Nathan* v. *Giles* (1814), 5 Taunt. 558. He cannot, however, rely on a counterclaim against the judgment debtor (*Stumore* v. *Campbell & Co.*, [1892] 1 Q. B. 314, C. A.). As to what may be included in a set-off, see title SET-OFF AND COUNTERCLAIM.

(*t*) *Tapp* v. *Jones*, *supra*, at p. 593; compare *Fitt* v. *Bryant* (1883), Cab. & El. 194.

(*u*) *Sampson* v. *Seaton Rail. Co.* (1874), L. R. 10 Q. B. 28.

(*w*) The judgment debtor is not a party to the issue (*Levene* v. *Maton* (1907), 51 Sol. Jo. 532). The issue cannot be remitted to the county court (*Eastwood* v. *Whiteley* (1887), 82 L. T. Jo. 286). As to issues generally, see title PRACTICE AND PROCEDURE.

(*x*) *Wilson* v. *Dundas and Stevenson*, [1875] W. N. 232.

(*a*) R. S. C., Ord. 45, r. 4. As to reference to a master, see, generally, title PRACTICE AND PROCEDURE.

(*b*) For the judgment creditor cannot then attach it (*Hancock* v. *Smith* (1889), 41 Ch. D. 456, C. A., where the money was in a bank standing to the judgment debtor's credit, though no part of it in fact belonged to him); and see p. 93, *ante*. It is the duty of the garnishee to inform the court of any reason why the order should not be made (*The Leader* (1868), L. R. 2 A. & E. 314; compare *Wood* v. *Dunn* (1866), L. R. 2 Q. B. 73, Ex. Ch.).

(*c*) See p. 97, *ante*.

(*d*) See p. 97, *ante*.

(*e*) R. S. C., Ord. 45, r. 5. Even where the garnishee does not suggest that a third person has a claim, the master has power to hear any claimant (*Roberts* v. *Death* (1881), 8 Q. B. D. 319, C. A.). If circumstances are brought to the master's knowledge affording reasonable grounds for supposing that the money in question is trust money, he should not make the order absolute, but should order the money to be paid into court to abide the event of an inquiry (*ibid.*).

(*f*) R. S. C., Ord. 45, r. 6.

(*g*) *Ibid.*

(*h*) *Ibid.*

(*i*) *Martin* v. *Nadel*, [1906] 2 K. B. 26, C. A., where the garnishee was a

SECT. 1. Attachment of Debts.

Appeal.

180. From the decision of the master making the order absolute an appeal lies to the judge in chambers (*j*), and by leave from the judge in chambers to the Court of Appeal (*k*). Where an issue is tried by a master, or a question is referred to him to determine, an appeal from his decision lies to the Divisional Court (*l*).

Mistake.

181. A garnishee order made under a mistake, whether mutual or not, may be set aside, and any moneys paid under it by the garnishee will then be ordered to be repaid (*m*).

(iv.) *Effect of the Order Absolute.*

Order absolute.

182. Upon the order being made absolute the garnishee becomes liable, unless he has already made a payment into court (*n*), to pay to the judgment creditor the amount due from him to the judgment debtor, or as much as may be sufficient to pay the judgment debt and the costs of the garnishee proceedings (*o*).

Where money is paid into court, the judgment creditor is entitled to take it out (*p*). If it is not so paid he may enforce payment by execution (*q*), or, where execution cannot be issued, by an action on the order (*a*). He is not, however, entitled to issue a bankruptcy notice based upon the order (*b*). His right to the debt is further qualified by the fact that he takes it subject to all rights and equities attaching to it in the hands of the garnishee (*c*).

If the garnishee makes any payment under the order (*d*), or has

foreigner, and payment under the garnishee order might not be a sufficient discharge, if he were sued for the debt in his own country; *Re Clatton, Richardson* v. *Greaves* (1861), 10 W. R. 45, where the garnishee was being sued for the debt.

(*j*) R. S. C., Ord. 54, r. 21; see title PRACTICE AND PROCEDURE.

(*k*) *Hockley* v. *Ansale* (1896), 44 W. R. 666. No appeal lies from the judge in chambers on a question of costs without his leave; in this case the Court of Appeal cannot give leave (*Adlington* v. *Conyngham*, [1898] 2 Q. B. 492, C. A.).

(*l*) So held in *Blair* v. *Clark*, [1908] 2 K. B. 548. Where by consent the claim of a third person to his debt is decided summarily by the judge in chambers instead of an issue being directed to be tried, the judge's decision is final (*Eade* v. *Winser & Son* (1878), 47 L. J. (Q. B.) 584).

(*m*) *Marshall* v. *James*, [1905] 1 Ch. 432, following *Moore* v. *Peachey* (1892), 66 L. T. 198; see *Burrell & Sons* v. *Read* (1894), 11 T. L. R. 36, C. A.

(*n*) See p. 98, *ante*. As to the effect of payment into court, see *infra*.

(*o*) R. S. C., Ord. 45, r. 3.

(*p*) *Culverhouse* v. *Wickens* (1868), L. R. 3 C. P. 295, where he was held so entitled, notwithstanding the subsequent execution of a composition deed.

(*q*) R. S. C., Ord. 45, r. 3; but not by sequestration, see p. 80, *ante*. Execution is barred by a composition deed in the same way as execution on a judgment (*Kent* v. *Tomkinson* (1867), L. R. 2 C. P. 502); see p. 29, *ante*.

(*a*) *Pritchett* v. *English and Colonial Syndicate*, [1899] 2 Q. B. 428, C. A. If the judgment debtor has already brought an action against the garnishee for the debt, the judgment creditor may be made co-plaintiff (*Wallis* v. *Smith* (1882), 51 L. J. (CH.) 577; *Re Clatton, Richardson* v. *Greaves* (1861), 10 W. R. 45).

(*b*) *Re Combined Weighing and Advertising Machine Co.* (1889), 43 Ch. D. 99; *Ex parte Chinery* (1884), 12 Q. B. D. 342, C. A. See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 37.

(*c*) *Norton* v. *Yates*, [1906] 1 K. B. 112, 121; *Campion* v. *Palmer*, [1896] 2 I. R. 445, C. A.; *O'Connor* v. *Ireland*, [1897] 2 I. R. 150; see p. 97, *ante*.

(*d*) Payment into court after service of the order *nisi* is sufficient (*Culverhouse* v. *Wickens* (1868), L. R. 3 C. P. 295); but payment direct to the judgment creditor is not a discharge (*Re Webster, Ex parte Official Receiver*, [1907] 1 K. B. 623; *Turner* v. *Jones* (1857), 1 H. & N. 878; *Lockwood* v. *Nash* (1856),

execution levied upon him, he is discharged from his liability to the judgment debtor to the extent of the amount paid or levied (*e*), even though the garnishee proceedings are afterwards set aside or the judgment or order on which they are based reversed (*f*). Hence an order absolute will prevent the judgment debtor after its date from issuing execution (*g*) or serving a bankruptcy notice (*h*) in respect of the debt, if he has already obtained judgment upon it.

(v.) *Attachment Book and Costs.*

Attachment book.

183. Provision is made for the keeping of a book in which entries are to be made of the attachment and garnishee proceedings, with the requisite names and dates, and statements of the amount recovered, and otherwise (*i*). Copies of any entry may be obtained, free of charge, by any person on application (*k*).

Costs.

184. The costs of any application and of any proceeding arising out of or incidental to an application for attachment of debts are in the master's discretion (*l*). The costs of an issue, however, usually abide the event (*m*), unless the judgment creditor refuses to accept an issue, in which case he has to pay all the costs (*n*). If the garnishee disputes his liability unsuccessfully, the judgment creditor will generally get his costs (*o*).

The judgment creditor may, unless it is otherwise ordered, retain his costs out of the money recovered by him under the garnishee order, and in priority to the amount of the judgment debt (*p*).

SECT. 2.—*Charging Orders on Stock and Shares.*

SUB-SECT. 1.—*In General.*

Execution against stocks or shares.

185. A charging order is the method by which stocks or shares or a fund in court are made available to satisfy a judgment or

18 C. B. 536; *O'Connor* v. *Ireland*, [1897] 2 I. R. 150, where the garnishee paid after notice, but before service of the order), unless the order has been made absolute (*Re Trehearne, Ex parte Ealing Local Board* (1890), 60 L. J. (Q. B.) 50, C. A.; *Wood* v. *Dunn* (1866), L. R. 2 Q. B. 73, Ex. Ch.; and compare *Cooper* v. *Brayne* (1858), 27 L J. (EX.) 446).

(*e*) The giving of a promissory note is not in itself payment (*Turner* v. *Jones* (1857), 1 H. & N. 878).

(*f*) R. S. C., Ord. 45, r. 7. But payment under an attachment which is void is not a discharge to the garnishee as against the person entitled (*Chapman* v. *Callis* (1862), 6 L. T. 282, where a debt belonging to a testator's estate had been attached to meet the executor's private liability; *Re Smith, Ex parte Brown* (1888), 20 Q. B. D. 321, C. A.).

(*g*) *Re Connan, Ex parte Hyde* (1888), 20 Q. B. D. 690, C. A.

(*h*) *Ibid.*

(*i*) R. S. C., Ord. 45, r. 8.

(*k*) *Ibid.*

(*l*) *Ibid.*, r. 9; *Adlington* v. *Conyngham*, [1898] 2 Q. B. 492, C. A., where it was held that no appeal lies from the refusal of the judge in chambers to allow costs, except by his leave.

(*m*) *Johnson* v. *Diamond* (1855), 11 Exch. 431.

(*n*) *Wintle* v. *Williams* (1858), 3 H. & N. 288.

(*o*) *Johnson* v. *Diamond, supra.*

(*p*) R. S. C., Ord. 45, r. 9. The costs of execution against the garnishee are payable out of the proceeds (*Simmons* v. *Storer* (1880), 14 Ch. D. 154).

SECT. 2. Charging Orders on Stock and Shares.

order. If a person (*q*) against whom a judgment or order (*r*) has been entered up or made in any division of the High Court (*s*) has any Government stock, funds, or annuities (*t*), or any stock or shares (*a*) of or in any public company (*b*) in England (whether incorporated or not), standing in his name in his own right (*c*), or in the name of any person in trust for him (*d*), a judge of the

(*q*) Including a municipal corporation (*A.-G.* v. *Thetford Corporation* (1860), 8 W. R. 467).

(*r*) R. S. C., Ord. 42, r. 24.

(*s*) As to charging orders in respect of a judgment of the county court, see p. 128, *post*.

(*t*) An annuity granted by a company cannot be charged under this procedure (*Morris* v. *Manesty* (1845), 7 Q. B. 674; *Taylor* v. *Turnbull* (1859), 4 H. & N. 495).

(*a*) Debentures of a company are not stocks or shares within this provision, and cannot be made the subject of a charging order (*Sellar* v. *Bright* (*Charles*) *& Co., Ltd.*, [1904] 2 K. B. 446, C. A.), nor can a sum in court which does not represent dividends or interest of the prescribed securities (*Brereton* v. *Edwards* (1888), 21 Q. B. D. 488, C. A; but see *Re Bell, Carter* v. *Stadden* (1886), 34 W. R. 363). A charging order has been made in Ireland over the interest of a plaintiff in a fund paid by him into court to the credit of an action as security for the defendant's costs (*Adams* v. *Gillen* (1875), 9 I. R. C. L. 148).

(*b*) A public company is one which is obliged to publish the names and addresses of its members (*Macintyre* v. *Connell* (1851), 1 Sim. (N. S.) 225, *per* Lord CRANWORTH, V.-C., at p. 239; *Graham* v. *Connell* (1850), 19 L. J. (EX.) 361). It is, perhaps, doubtful whether a cost-book mining company comes within the description (*Nicholls* v. *Rosewarne* (1859), 6 C. B. (N. S.) 480).

(*c*) In order that a charging order may be obtained upon shares standing in the name of a person it is necessary that he should have not only the legal ownership of them, but the beneficial ownership also, and where, though standing in his name, he has no beneficial interest in them, either because the shares have been transferred into his name by persons retaining the beneficial ownership, or he has sold them, a judgment creditor cannot obtain a charging order upon them (*Cooper* v. *Griffin*, [1892] 1 Q. B. 740, C. A. (discussing *Pulbrook* v. *Richmond Consolidated Mining Co.* (1878), 9 Ch. D. 610), followed in *Howard* v. *Sadler*, [1893] 1 Q. B. 1). But shares may be standing in the name of a person in his own right if he is on the register though he has deposited the certificate as security for a debt (*Fuller* v. *Earle* (1852), 7 Exch. 796). The words "in his own right" bear a different meaning for the purposes of qualification as a director of a company and for the purposes of the Judgments Act, 1838 (1 & 2 Vict. c. 110). The same shares may be held by the judgment debtor "in his own right" for purposes of qualification, but not so as to render them available for the purpose of a charging order (*Sutton* v. *English and Colonial Produce Co.*, [1902] 2 Ch. 502, 507); and see *Re Blakely Ordnance Co., Ltd., Coates's Case* (1876), 46 L. J. (CH.) 367.

(*d*) The fact that the stock stands in the name of trustees in trust for another besides the judgment debtor does not prevent its being stock standing "in the name of any person in trust for him" (*South Western Loan and Discount Co.* v. *Robertson* (1881), 8 Q. B. D. 17). Where the trustees are under an imperative obligation to convert the stock into money, and therefore the only interest of the judgment debtor is not in the stock but in the proceeds of the sale of it, a charging order cannot be obtained (*Dixon* v. *Wrench* (1869), L. R. 4 Exch. 154, but the authority of this case has been doubted by KEKEWICH, J., in *Ideal Bedding Co., Ltd.* v. *Holland*, [1907] 2 Ch. 157). Where there is a trust for sale of shares, the produce to be held partly in trust for the judgment debtor, the judgment debtor may still have an interest in the shares which may be charged (*Cragg* v. *Taylor* (1867), L. R. 2 Exch. 131); *à fortiori*, where there is no imperative trust for sale, and the judgment debtor may hereafter acquire an absolute title to a portion of the stock in "specie" (*Bolland* v. *Young*, [1904] 2 K. B. 824, C. A., followed in *Ideal Bedding Co., Ltd.* v. *Holland*, *supra*). An interest in dividends payable by trustees can be reached by a charging order,

SECT. 2. Charging Orders on Stock and Shares.

High Court (*e*), or a master (*f*), may, on the application of a judgment creditor, order that such stock, funds, annuities, or shares, or such of them, or such part thereof respectively as he thinks fit (*g*), shall stand charged with the payment of the amount due or to become due under the judgment or order, and interest thereon (*h*).

Extent of order.

186. The order extends to every interest of the judgment debtor, whether in possession, remainder, or reversion, and whether vested or contingent (*i*), in the specified securities and the dividends, interest, or annual produce thereof, and to any such interest of his in any such securities standing in the name of the Paymaster-General (*k*). A voluntary settlement which is void under the statute 13 Eliz., c. 5, cannot effectually be set up to prevent a charging order being made (*l*).

Must be for ascertained sum.

187. The judgment or order must be for an ascertained sum of money (*m*), though payment thereof may have been postponed until a future day by the judgment or order (*n*). An order may be made on money in court belonging to a judgment debtor in respect of arrears of a debt which is payable by instalments (*o*).

but the order will not prevent the Bank of England paying the dividends to the trustees (*Churchill* v. *Bank of England* (1843), 11 M. & W. 323; *Fowler* v. *Churchill* (1843), 11 M. & W. 57; *Rogers* v. *Holloway* (1843), 5 Man. & G. 292; *Bristed* v. *Wilkins* (1843), 3 Hare, 235; *South Western Loan and Discount Co.* v. *Robertson* (1881), 8 Q. B. D. 17; but see *Peat* v. *Moran* (1867), 15 W. R. 997). The judgment creditor can protect his rights by giving a notice in lieu of a *distringas* (*Adam* v. *Bank of England* (1908), 52 Sol. Jo. 682), as to which, see p. 113, *post*.

(*e*) R. S. C., Ord. 46, r. 1.

(*f*) R. S. C., Ord. 54, r. 12. A registrar of the Probate, Divorce, and Admiralty Division may make the order (*ibid.*), as may a district registrar (*ibid.*, Ord. 35, r. 6).

(*g*) See *Stanley* v. *Bond* (1844), 8 Beav. 50.

(*h*) Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 14. Though this section does not apply to cash, yet a charging order by way of equitable execution upon cash in court in the Chancery Division may be made by virtue of s. 12 of the Act (which enables a sheriff to seize cheques and money under a *fi. fa.*) on the principle that when the court has in its possession a thing which would otherwise have been liable to seizure under a *fi. fa.*, the court ought to assist the creditor to obtain the fruits of his judgment (*Brereton* v. *Edwards* (1888), 21 Q. B. D. 488, C. A.; and see *Townend* v. *Jones* (1889), 5 T. L. R. 609); compare *Woodham Smith* v. *Edwards*, [1908] 2 K. B. 899, C. A. As to equitable execution, see p. 115, *post*.

(*i*) See *Baker* v. *Tynte* (1860), 2 E. & E. 897; *Cragg* v. *Taylor* (1867), L. R. 2 Exch. 131; *Ideal Bedding Co., Ltd.* v. *Holland*, [1907] 2 Ch. 157.

(*k*) Judgments Act, 1840 (3 & 4 Vict. c. 82), s. 1, as varied by the Court of Chancery (Funds), Act, 1872 (35 & 36 Vict. c. 44), ss. 4, 6, and Judicature (Funds etc.) Act, 1883 (46 & 47 Vict. c. 29), s. 2; and see *Bolland* v. *Young*, [1904] 2 K. B. 824, 828, C. A.; *Witham* v. *Lynch* (1847), 1 Exch. 391.

(*l*) *Ideal Bedding Co., Ltd.* v. *Holland*, *supra*.

(*m*) A charging order will not be made for a sum to be ascertained in taking an account (*Chadwick* v. *Holt* (1856), 8 De G. M. & G. 584, C. A.; *Widgery* v. *Tepper, Hall* v. *Tepper* (1877), 6 Ch. D. 364, C. A.), nor for costs before they are taxed (*Jones* v. *Williams* (1841), 8 M. & W. 349; *Widgery* v. *Tepper, Hall* v. *Tepper, supra*, not following *Burns* v. *Irving* (1876), 3 Ch. D. 291), nor upon a judgment or order for payment into court (*Ward* v. *Shakeshaft* (1860), 1 Drew. & Sm. 269).

(*n*) *Bagnall* v. *Carlton* (1877), 6 Ch. D. 130.

(*o*) See *Woodham Smith* v. *Edwards*, *supra*.

SECT. 2. Charging Orders on Stock and Shares.

Executors.

188. An order will not be made where the judgment debtor only holds the securities as the nominee of another person (*p*), or as an executor (*q*). If the judgment debtor is dead, an order cannot be made against his executor, until a judgment or order has been given or made against the executor (*r*).

Infants.

189. A charging order will not be made against the property of an infant when the judgment was obtained in respect of a debt for which the infant could not be made legally liable (*s*).

Married women.

190. As the interest of the judgment debtor must be an assignable one in order to be charged, a charging order will not in any case be made against stocks or shares of a married woman which she is restrained from anticipating (*t*), but it may be made, subject to the restraint, against securities in which she has an interest (*a*).

Lunatics.

191. A charging order may be obtained against the property of a lunatic in respect of a judgment for debts incurred before the lunacy, and may be enforced against the estate of the lunatic after his death; for the effect of a charging order does not depend upon the capacity of the judgment debtor to give a valid charge, but upon the validity of the judgment (*b*); and effect will be given to a charging order upon the interest of a lunatic in a fund in the High Court during his life, without regard to the needs of the lunatic, where that fund has not been brought within the control of the lunacy court, and the balance only of the funds after satisfying the charge will be transferred to the proceedings in lunacy (*c*). On the other hand, where the fund in court has been paid in by a receiver of the lunatic's property appointed by an order in lunacy, the court will order a proper allowance for the maintenance of the lunatic to be made out of the capital and income of the fund, though the effect may be to make the capital insufficient for the payment of the creditors of the lunatic who have obtained charging orders on the

(*p*) *Re Blakely Ordnance Co., Ltd., Coates's Case* (1876), 46 L. J. (CH.) 367. Where the judgment debtor has sold his securities, so that he has only an interest in the price, a charging order on the securities is not available (*Gill* v. *Continental Gas Co.* (1872), L. R. 7 Exch. 332), but a charging order over the money may be made, or a receiver appointed.

(*q*) *Taylor* v. *Turnbull* (1859), 4 H. & N. 495; *Hodgens* v. *Hodgens* (1877), 11 I. R. Eq. 439. A charging order against the judgment debtor's stock or shares will not be made on a judgment obtained against him *de bonis testatoris* (*Hewat* v. *Davenport* (1872), 21 W. R. 78).

(*r*) *Finney* v. *Hinde* (1879), 4 Q. B. D. 102; *Stewart* v. *Rhodes*, [1900] 1 Ch. 386, C. A., where, the order being against "the defendant's interest," the court refused to amend it by making it an order against his executor's interest (*ibid.*). But see *Irwin* v. *Nesbit* (1848), 13 I. Eq. R. 125.

(*s*) *Re Onslow's Trusts* (1875), L. R. 20 Eq. 677; see title INFANTS AND CHILDREN.

(*t*) *Stanley* v. *Stanley* (1878), 7 Ch. D. 589.

(*a*) *Carter* v. *Mahon* (1841), Fl. & K. 342; and see *Smith* v. *Whitlock* (1886), 34 W. R. 414; and title HUSBAND AND WIFE.

(*b*) *Re Leavesley* (*a Person of Unsound Mind, Deceased*), [1891] 2 Ch. 1, C. A.

(*c*) *Re Brown, Llewellin* v. *Brown*, [1900] 1 Ch. 489. See also title LUNATICS AND PERSONS OF UNSOUND MIND.

fund, and such creditors are not entitled to have impounded an amount of capital sufficient to meet their demands (*d*).

SECT. 2. Charging Orders on Stock and Shares.

192. A charging order cannot be obtained against a fund in court forming part of the assets of a defaulting member of the Stock Exchange, where such assets are being realised by the official assignee pursuant to the rules of the Stock Exchange (*e*).

Defaulter on Stock Exchange.

SUB-SECT. 2.—*Procedure to obtain a Charging Order.*

(i.) *The Order Nisi.*

193. A charging order consists of two parts, the order *nisi* and the order absolute (*f*). The application for an order *nisi* is made in the first place to a master in the King's Bench Division (*g*) *ex parte* upon an affidavit, and in the Chancery Division by *ex parte* summons supported by an affidavit (*h*). The affidavit and summons should be intituled in the action in which the judgment or order has been given or made (*i*).

Application for order.

In the first instance an order *nisi* is made fixing a day for the debtor to show cause. This order is served upon the debtor and upon the person or body having control of the fund sought to be charged; if the fund is in court in the Chancery Division notice of the order to the Paymaster-General is sufficient without obtaining

(*d*) *Re Plenderleith* (*a Person of Unsound Mind, so found by Inquisition*), [1893] 3 Ch. 332, C. A.; compare *Re Winkle*, [1894] 2 Ch. 519, C. A. The judge has no power to make an order providing that the amount to be charged should be determined by the Lords Justices sitting in Lunacy, and the judgment creditor is entitled to an unconditional order on a specified amount of the fund (*Horne* v. *Pountain* (1889), 23 Q. B. D. 264). R. S. C., Ord. 46, r. 1, does not apply to an order made under s. 109 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5), directing costs to be paid out of the alleged lunatic's estate, and, therefore, an order charging costs upon stock standing in the name of the alleged lunatic, and directing a transfer of a sufficient amount to meet such costs, followed, upon neglect to make the transfer, by another order that the official solicitor should execute the necessary transfer, may be made for the purpose of carrying the charge into effect, since the matter is outside the procedure provided for by r. 1 (*Re Cathcart*, [1893] 1 Ch. 466, C. A.).

(*e*) *Lomas* v. *Graves & Co.*, [1904] 2 K. B. 557, C. A.; *Richardson* v. *Stormont, Todd & Co.*, [1900] 1 Q. B. 701, C. A.; and see title STOCK EXCHANGE.

(*f*) *Haly* v. *Barry* (1868), 3 Ch. App. 452: *Brereton* v. *Edwards* (1888), 21 Q. B. D. 488, C. A.

(*g*) If the cause or matter is proceeding in a district registry the application will be made to the district registrar, unless the court or a judge otherwise orders (R. S. C., Ord. 35, r. 5). For proceedings upon application for a charging order under s. 23 of the Partnership Act, 1890 (53 & 54 Vict. c. 39), or for a charging order in respect of solicitor's costs, see Yearly Practice of the Supreme Court, 1911, pp. 649 *et seq.*; and titles PARTNERSHIP; SOLICITORS.

(*h*) For form of affidavit, see Daniell, Chancery Forms, 5th ed., pp. 461, 462. It should verify the sum payable, describe the stock or shares, and state that the deponent believes the judgment debtor is beneficially interested therein.

(*i*) An order may be made in the King's Bench Division charging cash standing to the credit of the debtor in an action pending in the Chancery Division (*Brereton* v. *Edwards*, *supra*; see *Townend* v. *Jones* (1889), 5 T. L. R. 609; compare *Woodham Smith* v. *Edwards*, [1908] 2 K. B. 899, C. A.). Where it is sought to obtain an order charging a fund in court, a certificate of the fund must be produced. Where the stocks or shares to be charged are in more than one company, separate orders must be drawn up.

SECT. 2. Charging Orders on Stock and Shares.

a stop order (*k*). The order *nisi*, or notice thereof, must be served a reasonable time before the day fixed for showing cause, certainly not less than two clear days. Service upon the debtor should be personal where possible, and must be proved by affidavit where he fails to appear on the hearing of the application to make the order absolute. It cannot be effected by filing in default (*l*) where the debtor has not appeared in the action (*m*). The bank or company upon whom notice is also served need not ordinarily appear, and as a rule will not be allowed costs of so doing.

The form of the order *nisi* (*n*) is that the stock or shares do stand charged with the payment of the amount payable unless the judgment debtor shall, within the time therein stated, show good cause to the contrary (*o*).

Varying and discharging the order.

194. An order *nisi* may be discharged or varied (*p*) upon the application of the judgment debtor or any person interested (*q*), and costs may be awarded upon such an application as the court, judge, or master may think fit (*r*).

An application to discharge an order must be made within the period stated therein for showing cause (*s*).

Effect of order.

195. No disposition by the judgment debtor of the affected property made between the order *nisi* and the order absolute is valid or effectual as against the judgment creditor (*t*).

(ii.) *The Order Absolute.*

Making order absolute.

196. Unless the judgment debtor, at the time mentioned in the order, shows sufficient cause to the contrary, the order may, after proof of notice thereof to the judgment debtor, his solicitor or agent, be made absolute (*a*). The order may be simply that the

(*k*) *Brereton* v. *Edwards* (1888), 21 Q. B. D. 488, C. A.; and see Supreme Court Funds Rules, 1905, r. 99.

(*l*) Under R. S. C., Ord. 67, r. 4.

(*m*) Service of the order *nisi* upon the solicitor for the person whose shares are sought to be charged, and at his last address, is sufficient without an order for substituted service (*Re Paragon and Spero Mining Co.* (1861), 10 W. R. 76).

(*n*) For form, see R. S. C., App. K, No. 27, and *Stanley* v. *Bond* (1844), 8 Beav. 50.

(*o*) The order may fix a day certain, on which day cause must be shown (*Robinson* v. *Burbridge* (1850), 9 C. B. 289). When it is once made, no application to discharge it will be entertained until it is heard on the application for the order absolute (*Baldwin* v. *Timbrell* (1842), 6 Jur. 488).

(*p*) In *Mitchell* v. *De Vesey* (1892), 67 L. T. 53, it was held that a master having once made an order *nisi* could not discharge it, except by consent, but that decision is rendered obsolete by R. S. C., Ord. 54, r. 12, as amended by R. S. C., June, 1908.

(*q*) Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 15; and see *Jeffryes* v. *Reynolds, Ex parte Reynolds* (*W. H.*) (1883), 48 L. T. 358; *Drew* v. *Willis, Ex parte Martin*, [1891] 1 Q. B. 450, C. A.

(*r*) Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 15; *Jeffryes* v. *Reynolds, Ex parte Reynolds, supra.*

(*s*) *Morris* v. *Manesty* (1845), 7 Q. B. 674; but see *Brown* v. *Bamford* (1846), 15 L. J. (CH.) 361.

(*t*) Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 15.

(*a*) *Ibid.* The master has a discretion in the matter, and may refuse to make the order absolute where the shares are of no value beyond existing charges upon them (*Wicks* v. *Shanks* (1893), 67 L. T. 609; see *per* Lord ESHER, M.R., at p. 610). A master in the King's Bench Division may make the order

judgment debtor's interest in the stock or shares do stand charged with the amount payable (*b*), or may be restricted to such a sum as is payable in respect thereof to the judgment debtor for his own benefit (*c*).

A charging order cannot be made absolute where it appears that the judgment debtor was dead when the order *nisi* was obtained (*d*); nor is there power after the death of a judgment debtor to make a charging order against his executor in respect of a judgment debt of the deceased unless judgment has first been obtained against the executor. It is doubtful whether such a judgment can be obtained under the present practice, but the creditor can bring an administration action (*e*).

The order absolute takes effect as from the date of the order *nisi*, which cannot be defeated by any subsequent act of the debtor (*f*). When the order has been made absolute it has been held that there is no power to rescind it (*g*), nor will an action lie to review it (*h*); but the time for appealing from the order may be extended (*i*). Both the order *nisi* and the order absolute are subject to appeal (*k*).

SUB-SECT. 3.—*Effect of the Order.*

Order equivalent to a charge.

197. The order, when made, has the same but no greater effect, and confers upon the judgment creditor the same remedies, as if the judgment debtor had made a valid and effective charge in favour of the judgment creditor (*l*), but no proceedings can be taken to have the benefit of such charge until after the expiration of six calendar months from the date of the order *nisi* (*m*).

absolute (R. S. C., Ord. 54, r. 12, as amended by R. S. C., June, 1908), and so may a district registrar (R. S. C., Ord. 35, r. 6). For form of order absolute, see R. S. C., App. K, No. 28. For form of charging order in respect of solicitor's costs, see *ibid.*, No. 29; see also title SOLICITORS.

(*b*) The order will be made absolute notwithstanding proceedings by creditors against the trustees who hold the stock (*Smith* v. *Youde* (1860), 2 F. & F. 376). An order has been made in the form of an order *nisi* for a week, and after that time absolute unless cause shown (*Baker* v. *Tynte* (1860), 2 E. & E. 897), but this is unusual.

(*c*) *Fowler* v. *Churchill* (1843), 11 M. & W. 57; see also *Horne* v. *Fountain* (1889), 23 Q. B. D. 264. The Bank of England will not take the responsibility or trouble of charging a part only (*Stanley* v. *Bond* (1844), 8 Beav. 50).

(*d*) *Finney* v. *Hinde* (1879), 4 Q. B. D. 102.

(*e*) *Stewart* v. *Rhodes*, [1900] 1 Ch. 386, C. A.

(*f*) *Brereton* v. *Edwards* (1888), 21 Q. B. D. 488, C. A.; *Haly* v. *Barry* (1868), 3 Ch. App. 452; *Warburton* v. *Hill*, *Stent* v. *Wickens* (1854), Kay, 470.

(*g*) *Drew* v. *Willis*, *Ex parte Martin*, [1891] 1 Q. B. 450, C. A.; *Jeffryes* v. *Reynolds*, *Ex parte Reynolds* (*W. H.*) (1883), 48 L. T. 358.

(*h*) *Bright* (*Charles*) *& Co., Ltd.* v. *Sellar*, [1904] 1 K. B. 6, C. A.

(*i*) *Sellar* v. *Bright* (*Charles*) *& Co., Ltd.*, [1904] 2 K. B. 446, C. A.

(*k*) *Brain* v. *Herrick* (1894), 10 R. 171.

(*l*) Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 14; Judgments Act, 1840 (3 & 4 Vict. c. 82), s. 1; *Re Leavesley* (*a Person of Unsound Mind, Deceased*), [1891] 2 Ch. 1, C. A.

(*m*) Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 14. This proviso does not prevent a judgment creditor using other means that may be open to him to protect his claim, *e.g.*, he may obtain a stop order on securities in court, or an injunction to restrain dealings with the stock and shares (*Watts* v. *Jefferyes* (1851), 3 Mac. & G. 372; *Bristed* v. *Wilkins* (1843), 3 Hare, 235). A charging order, however, is not a "transaction" protected by s. 49 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52) (*Re O'Shea's Settlement*, *Courage* v. *O'Shea*, [1895]

SECT. 2. Charging Orders on Stock and Shares.

If the judgment or order against the debtor is set aside, the charging order ceases to be operative (*n*).

Prior incumbrancers.

198. The charge only affects the interest of the judgment debtor at the date of the order *nisi* (*o*), so that a prior incumbrancer, whether legal or equitable, is not prejudiced thereby, even though he has not given notice of his charge on the property (*p*).

Effect of order.

199. A charging order *nisi*, if any Government stock, funds, or annuities, or any stocks or shares standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, are affected by such order, restrains the Governor and Company of the Bank of England, or the public company, as the case may be, from permitting a transfer of such stock etc. in the meantime and until such order is made absolute or discharged (*q*).

But the order *nisi* does not prevent the Governor and Company of the Bank of England, or any public company, from permitting any transfer of the stock, funds, annuities, or shares in respect of which the order is made, or payment of the interest, dividends, or annual produce thereof, in such manner as the court may direct (*r*).

The order operates as an injunction stopping the transfer of the stock or shares. It should be served upon the corporation or company and upon the judgment debtor. Personal service is not essential, but advisable (*a*).

If after notice of such order has been given to the person or persons to be restrained thereby, or, in case of corporations, to any authorised agent of such corporation, and before the same order shall be discharged or made absolute, such person or persons or corporation

1 Ch. 325, C. A.), nor is it an execution against the goods of the judgment debtor within s. 45 of that Act (*Re Hutchinson, Ex parte Hutchinson* (1885), 16 Q. B. D. 515). It may determine a life interest limited to a person until he executes some assignment and does an act whereby the interest may be incumbered (*Montefiore* v. *Behrens* (1865), L. R. 1 Eq. 171; *Roffey* v. *Bent* (1867), L. R. 3 Eq. 759).

Where a judgment creditor has obtained a charging orger absolute upon the contingent equitable interest of a judgment debtor in Government and Bank of England stock standing in the name of a trustee, the Bank is compellable to transfer the respective stocks at the direction of the trustee notwithstanding that notice of the charging order has been served upon the Bank. The judgment creditor can protect his rights by giving notice to the trustee and by issuing a notice in lieu of *distringas* upon the Bank (*Adam* v. *Bank of England* (1908), 52 Sol. Jo. 682).

(*n*) *Re Onslow's Trusts* (1875), L. R. 20 Eq. 677.

(*o*) *Scott* v. *Hastings* (*Lord*) (1858), 4 K. & J. 633; *Gray* v. *Stone and Funnell* (1893), 69 L. T. 282; see also *Beavan* v. *Oxford* (*Earl*) (1855), 6 De G. M. & G. 492, C. A.; *Kinderley* v. *Jervis* (1856), 22 Beav. 1; *Pickering* v. *Ilfracombe Rail. Co.* (1868), L. R. 3 C. P 235.

(*p*) *Hulkes* v. *Day* (1840), 10 Sim. 41; *Re Bell, Carter* v. *Stadden* (1886), 54 L. T. 370; *Re Leavesley* (*a Person of Unsound Mind, Deceased*), [1891] 2 Ch. 1, C. A.; *Gill* v. *Continental Gas Co.* (1872), L. R. 7 Exch. 332, 338.

(*q*) Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 15.

(*r*) Judgments Act, 1840 (3 & 4 Vict. c. 82), s. 1.

(*a*) *Re Paragon and Spero Mining Co.* (1861), 8 Jur. (N. S.) 11. Service out of the jurisdiction may be directed (*Re Gethin, Ex parte Nixon* (1875), 9 I. R. Eq. 512; see also R. S. C., Ord. 11, r. 8a). The company, unless it is interested, as for example when under the usual article of association it has a lien for debts due from the shareholder, should not attend. Its costs of attendance will not be allowed in any other case (R. S. C., Ord. 65, r. 27 (23)).

permit any transfer to be made, the person or persons or corporation so permitting the transfer will be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as is sufficient to satisfy the judgment or order (*b*).

Priorities.

200. Charging orders rank *inter se* in priority according to the dates of the respective orders *nisi* (*c*).

A judgment creditor cannot obtain priority by a charging order over a fund in court in an administration action where a receiver has been appointed (*d*). A charging order over funds in court in the name of the Paymaster-General does not give priority according to the date of the notice of it to him, for he is not a trustee for the parties (*e*).

A charging order does not give priority over the lien of a judgment debtor's solicitor for his costs (*f*), though a solicitor who has notice of a charge must assert his lien promptly or he may postponed (*g*).

SUB-SECT. 4.—*Enforcing the Order.*

Enforcing order.

201. When the six months which must elapse before proceedings are taken to enforce the charge (*h*) have elapsed, the remedy of the unpaid judgment creditor is to take proceedings to secure a sale of

(*b*) Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 15; see also *Gill* v. *Continental Gas Co.* (1872), L. R. 7 Exch. 332.

(*c*) By reason of each charging order having the effect of a charge (Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 14).

(*d*) *Re Anglesey* (*Marquis*), *de Galve* (*Countess*) v. *Gardner*, [1903] 2 Ch. 727. Where an order *nisi* was obtained on the same day as, but before, an administration order was made, it was held that the order *nisi* might be made absolute, and the court refused an application by the plaintiff in the administration suit for an injunction to restrain further proceedings by the judgment creditor (*Haly* v. *Barry* (1868), 3 Ch. App. 452). When funds are in court, in order to give effect to the charging order, it is not necessary to obtain a stop order or the appointment of a receiver, but notice given to the Paymaster-General will be sufficient to secure priority (*Brereton* v. *Edwards* (1888), 21 Q. B. D. 488, C. A.). A judgment creditor cannot, by obtaining a charging order on a fund in court, acquire priority over a previous mortgagee of the fund who has obtained no order (*Re Bell, Carter* v. *Stadden* (1886), 34 W. R. 363); see also *Scott* v. *Hastings* (*Lord*) (1858), 4 K. & J. 633; *Brearcliff* v. *Dorrington* (1850), 4 De G. & Sm. 122; *Cole* v. *Eley*, [1894] 2 Q. B. 350, C. A.). A creditor who obtained a charging order on a fund in court and gave notice to the Accountant-General was held to have priority over a creditor who had obtained an order appointing himself receiver of the debtor's interest in the fund but subject to giving security and had not given security until after the first creditor had given notice of his charging order to the Accountant-General (*Fahey* v. *Tobin*, [1901] 1 I. R. 511, C. A.). The bank is bound to pay dividends on stock to the legal owner, and is not affected by service of a charging order on such dividends obtained against a person having an equitable interest (*Churchill* v. *Bank of England* (1843), 11 M. & W. 323).

(*e*) *Warburton* v. *Hill* (1854), 2 W. R. 365.

(*f*) *Dallow* v. *Garrold* (1884), 14 Q. B. D. 543; *Shippey* v. *Grey* (1880), 49 L. J. (Q. B.) 524, C. A.; *Birchall* v. *Pugin* (1875), L. R. 10 C. P. 397; *Haymes* v. *Cooper* (1864), 33 L. J. (CH.) 488; *The Jeff Davis* (1867), L. R. 2 A. & E. 1; *The Leader* (1868), L. R. 2 A. & E. 314.

(*g*) See *The Olive* (1859), Sw. 423.

(*h*) See p. 107, *ante*.

SECT. 2. Charging Orders on Stock and Shares.

the charged property. This cannot be done in the action in which the judgment was obtained; the proper procedure is by originating summons in the Chancery Division (*i*).

To the summons all parties interested, as, for instance, where the stock or shares are standing in the hands of trustees, the trustees, and also any incumbrancers, must be parties (*k*).

SECT. 3.—*Stop Orders.*

Object of a stop order.

202. When a fund is in court, or when the securities over which a charging order has been obtained are in court, it may be advisable, in order to obtain complete protection for the judgment creditor, to obtain a stop order (*l*), the object of which is to give notice of his claim or of the charging order to the court, and to prevent dealings with the funds in court without notice to the applicant (*m*). To obtain an order the applicant must establish a title, either under a charging order or as assignee or mortgagee, and it must appear that he is not entitled to immediate payment (*n*). It is not necessary for a judgment creditor to obtain a charging order in the division in which he recovered judgment before obtaining a stop order upon a fund in court to the credit of an action in the Chancery Division (*o*).

(*i*) *Cohen* v. *Beadell* (1891), 91 L. T. Jo. 250; *Leggott* v. *Western* (1884), 12 Q. B. D. 287; *Kolchmann* v. *Meurice*, [1903] 1 K. B. 534, C. A.; see Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34 (3). The remedy is sale, not foreclosure (*D'Auvergne* v. *Cooper*, [1899] W. N. 256); but see *Ricketts* v. *Ricketts*, [1891] W. N. 29. An order for service out of jurisdiction may be made by virtue of R. S. C., Ord. 11, r. 8A. Under the old practice this could not be done; see *Mority* v. *Stephan* (1888), 58 L. T. 850; *Kolchmann* v. *Meurice*, *supra*.

(*k*) *Macintyre* v. *Connell* (1851), 1 Sim. (N. S.) 225. Payment out of court summarily on petition or summons will not be made without substantive proceedings or consent of all parties interested (*Whitfield* v. *Prickett*, *Ex parte Brookes* (1842), 13 Sim. 259; *Pearse* v. *Brooke*, [1870] W. N. 216). On these proceedings parties interested may challenge the order (*Re Onslow's Trusts* (1875), L. R. 20 Eq. 677).

(*l*) See *Warburton* v. *Hill* (1854), 2 W. R. 365; *Stent* v. *Wickens* (1854), Kay, 470. It is not strictly necessary to follow up the charging order by a stop order, since notice of the charge to the Paymaster-General will in most cases be sufficient (*Brereton* v. *Edwards* (1888), 21 Q. B. D. 488, C. A.; see Supreme Court Fund Rules, 1905, r. 99); but it has been held that where a person becoming interested in a fund in court standing to an account in the name of another does not obtain a stop order against the fund, and the fund is subsequently paid out in disregard of his interest to a person apparently, but not in fact, entitled to it, the Paymaster-General is not guilty of default within the meaning of s. 5 of the Court of Chancery (Funds) Act, 1872 (35 & 36 Vict. c. 44), so as to make the Treasury liable to make good the funds out of the Consolidated Fund (*Bath* v. *Bath*, [1901] 1 Ch. 460; *Jones* v. *Jones* (1879), cited [1901] 1 Ch. 464, n.).

(*m*) It is sufficient if a specified fund has been ordered to be paid into court, or stock affected by a charging order has been ordered to be transferred into court, though it has not actually been paid in or transferred (*Shaw* v. *Hudson* (1879), 48 L. J. (CH.) 689; *Wellesley* v. *Mornington* (1862), 11 W. R. 17). Where the stock is not in court, but ordered, in a matter concerning it, to be sold, a stop order is not appropriate, and the judgment creditor must take separate proceedings to enforce his charging order (*Newton* v. *Askew* (1848), 11 Beav. 446).

(*n*) As to the practice in the Chancery Division, see the judgment of STIRLING, J., in *Mack* v. *Postle*, [1894] 2 Ch. 449; *Stephens* v. *Green*, *Green* v. *Knight*, [1895] 2 Ch. 148, C. A.

(*o*) *Shaw* v. *Hudson* (1879), 48 L. J. (CH.) 689; *Hopewell* v. *Barnes* (1876), 1 Ch. D. 630.

How obtained.

203. The application is ordinarily made by summons in chambers (*p*), but sometimes by petition (*q*). It is only necessary to serve the person whose interest is sought to be affected (*r*). An affidavit in support may sometimes be required (*s*).

Form.

204. The form of the order is that no part of the stock charged (*t*) be transferred, sold, or otherwise dealt with without notice to the party obtaining it (*a*), and the claim of the judgment creditor will be dealt with on application in the cause or matter to the credit of which the stock stands (*b*).

Priorities.

205. The effect of the stop order as to priority is to put the judgment creditor in much the same position as notice of an incumbrance to trustees who have a fund in hand would do (*c*).

(*p*) *Wrench* v. *Wynne* (1869), 38 L. J. (CH.) 235; *Walsh* v. *Wason* (1874), 22 W. R. 676. For form of summons, see R. S. C., App. K, No. 72. The summons must state whether capital or income, or both, are sought to be restrained (*Mack* v. *Postle*, [1894] 2 Ch. 449), and if income is to be restrained, *e.g.*, future income expectant on the death of an existing life tenant, the summons should ask that any existing order for payment of dividends may not be affected. In *Mack* v. *Postle*, *supra*, STIRLING, J., required the stop order to define the limit or extent of the assignor's interest. Where the assignee has transferred his interest, and a new stop order is required by the transferee, the summons should ask that the notice required to be given to the assignee by the former order may be given to the transferee instead; any priority obtained by the former stop order is thus preserved. When necessary to prevent an immediate dealing with the fund, the summons, when issued, should be produced at the Supreme Court Pay Office.

(*q*) Where a fund paid into court under the Trustee Relief Act exceeded £1,000, and no previous application had been made, it was held that an application for a stop order should be by petition (*Re Toogood's Trusts* (1887), 56 L. T. 703).

(*r*) *Parsons* v. *Groome* (1842), 4 Beav. 521. "Any person presenting a petition for a stop order shall not be required to serve such petition or summons upon the parties to the cause or matter or upon the persons interested in such parts of the moneys or securities as are not sought to be affected by any such order" (R. S. C., Ord. 46, r. 13).

(*s*) For form of affidavit in support of a summons for a stop order, see Daniell, Chancery Forms, 5th ed., p. 842. The affidavit must show generally how the assignor's interest in the fund is derived, unless this appears by the proceedings in the action (*Quarman* v. *Williams* (1842), 5 Beav. 133), in which case an affidavit will be dispensed with. A certificate of the fund must be produced in every case. No affidavit in support of the application is required where the assignor's title sufficiently appears from the proceedings or from the recitals in the assignment or other instrument on which the application is founded, and the assignor admits the execution of such instrument. This note of the practice is founded on a resolution of the Chancery Masters.

(*t*) The order should be distinct that it affects only the interest of the judgment debtor (*Macleod* v. *Buchanan* (1864), 4 De G. J. & Sm. 265, C. A.). For form of summons, see Daniell, Chancery Forms, 5th ed., p. 841; and of the order, Seton, Judgments and Orders, 6th ed., p. 491. For forms of summons and order discharging the stop order, see *ibid.*, pp. 843 and 494 respectively.

(*a*) *Lucas* v. *Peacock* (1846), 9 Beav. 177.

(*b*) *Reece* v. *Taylor* (1852), 5 De G. & Sm. 480.

(*c*) *Dearle* v. *Hall* (1825), 3 Russ. 1; *Macleod* v. *Buchanan* (1863), 33 Beav. 234; *Ward* v. *Duncombe*, [1893] A. C. 369; *Mutual Life Assurance Society* v. *Langley* (1886), 32 Ch. D. 460, C. A.; *Mack* v. *Postle*, *supra*. A mortgagee by obtaining a stop order obtains priority over the trustee in bankruptcy of the mortgagor who does not (*Stuart* v. *Cockerell* (1869), L. R. 8 Eq. 607; *Palmer* v. *Locke* (1881), 18 Ch. D. 381, C. A.). But the priority obtained by the stop order is only as against the parties to the matter (*Stephens* v. *Green*, *Green* v. *Knight*, [1895] 2 Ch. 148, C. A.). The authorities as to priority by

SECT. 3. Stop Orders.

The ordinary rule is that priority is given over prior incumbrances of which the person obtaining the stop order had no notice at the date of the order, and this rule applies to execution creditors *inter se*, but not as between execution creditors and incumbrancers (*d*).

means of stop orders do not affect execution creditors (except *inter se*), for they take only the debtor's interest, whatever it is (*Brearcliff* v. *Dorrington* (1850), 4 De G. & Sm. 122). Carrying over a part of the fund to a separate account after date of stop order will not prevent the priority gained by the stop order (*Lister* v. *Tidd* (1867), L. R. 4 Eq. 462; and see *Re Eyton, Bartlett* v. *Charles* (1890), 45 Ch. D. 458).

(*d*) See *Re Freshfield's Trust* (1879), 11 Ch. D. 198; *Montefiore* v. *Guedalla*, [1903] 2 Ch. 26, C. A. Where a tenant for life of a fund in court mortgaged his interest and afterwards became bankrupt, the mortgagee obtained, after the bankruptcy, a stop order on the dividends, it was held that he was entitled to priority over the assignee in bankruptcy who had not obtained such an order (*Stuart* v. *Cockerell* (1869), L. R. 8 Eq. 607; see also *Palmer* v. *Locke* (1881), 18 Ch. D. 381, C. A., and cases cited in note (*c*), p. 111, *ante*).

Where a first mortgagee obtains a stop order on a fund in court without giving notice to the trustees, after notice of a second mortgage given by a second mortgagee without knowledge of the first mortgage to the trustees but who has not obtained a stop order, the prior mortgagee is entitled to priority, since the stop order is the proper way of perfecting a security which is in court, the office of the trustees being suspended (*Pinnock* v. *Bailey* (1883), 23 Ch. D. 497). But a second incumbrancer who, at the time of taking his security, has notice of the existence of the first incumbrance cannot by obtaining a stop order gain priority over the first incumbrancer, even although the lattter never obtains a stop order (*Re Holmes* (*A. D.*) (1885), 29 Ch. D. 786, C. A.). If, however, the second incumbrancer had notice of the prior incumbrance only when he obtained the stop order and not at the time of taking his security he is not postponed to a prior incumbrancer who has obtained no stop order (*Mutual Life Assurance Society* v. *Langley* (1886), 32 Ch. D. 460, C. A.). Where part of the fund is in court and part in the hands of trustees notice must be given by the assignee to the trustees as to the latter part and a stop order obtained as to the former part in order to complete the security (*ibid.*).

Where, however, a receivership order is obtained by a judgment creditor and part of the judgment debtor's property affected is a fund in court in an administration action, and, by reason of the fund in court beingin sufficient to meet the testator's debts, the judgment debtor's share cannot be taken in execution or made available by any other legal process, a subsequent mortgagee or judgment creditor cannot obtain priority by means of a stop order (*Re Anglesey* (*Marquis*), *de Galve* (*Countess*) v. *Gardner*, [1903] 2 Ch. 727).

Where the stop order obtained was general in its terms and simply upon "the share" of the mortgagor, it was held that it affected the income arising from the fund notwithstanding the practice in the Paymaster-General's office of treating such orders as not affecting income, unless income is mentioned on the face of the order, and the mortgagees obtaining the order were held to be entitled to priority over the trustees of a prior settlement not disclosed by the mortgagor, who had obtained no stop order on the fund (*Mack* v. *Postle*, [1894] 2 Ch. 449).

The notice should be given to the holder of the fund, that is, to the person having the control or custody of the fund or legal dominion over it (*Mutual Life Assurance Society* v. *Langley*, *supra*, at p. 471; *Ward* v. *Duncombe*, [1893] A. C. 384), but this applies only where the holder of the fund is converted by the notice intc a trustee for the assignee (*Stephens* v. *Green*, *Green* v. *Knight*, [1895] 2 Ch. 148, C. A., *per* LINDLEY, L.J., at p. 159). Therefore, where there are two settlements and the fund has been paid in under the former, a second mortgagee, without notice, of the person entitled under the second settlement, who obtains a stop order on the fund in court, is not entitled to priority over the prior mortgagee under the same settlement who has not obtained a stop order but has given notice to the trustee of the assignor (*Stephens* v. *Green*, *Green* v. *Knight*, *supra*, overruling *Re Booth's Settlement Trusts* (1853), 1 W. R. 444, following *Holt* v. *Dewell* (1845), 4 Hare, 446). The court has the custody

Costs.

206. The costs occasioned by obtaining a stop order are in the discretion of the court (*e*). They are not, as a rule, payable out of the general fund (*f*).

SECT. 4.—*Notice in lieu of Distringas.*

Notice in lieu of *distringas*.

207. Where the stocks or shares charged are not in court it may be advisable, in order completely to protect the execution creditor, to issue a notice in lieu of *distringas* (*g*).

A person claiming to be interested (*h*) in any stock standing in the books of a company (*i*) may, on an affidavit by himself or his solicitor in the prescribed form (*k*), with such variations as circumstances may require, and on filing the same in the Central Office, with a notice also in the prescribed form (*l*), with such variations as circumstances may require, and on procuring an office copy of the affidavit and a duplicate of the filed notice authenticated by the seal of the Central Office, serve the office copy and duplicate notice on the company (*m*).

of the fund for the purposes of the action under which it was paid in, but not for any other purposes (*Stephens* v. *Green*, *Green* v. *Knight*, [1895] 2 Ch. 148, C. A., *per* STIRLING, J., at p. 155).

(*e*) Where any moneys or securities are in court to the general credit of any cause or matter, or to the account of any class of persons, and an order is made to prevent the transfer or payment of such moneys or securities, or any part thereof, without notice to the assignee of any person entitled in expectancy or otherwise to any share or portion of such moneys or securities, the person by whom any such order shall be obtained on the shares of such moneys or securities affected by such order shall be liable at the discretion of the court or a judge to pay any costs, charges, and expenses which, by reason of any such order having been obtained, shall be occasioned to any party to the cause or matter or any persons interested in any such moneys or securities (R. S. C., Ord. 46, r. 12).

(*f*) *Grimsby* v. *Webster* (1860), 8 W. R. 725. See also, as to costs, *Hoole* v. *Roberts* (1848), 12 Jur. 108; *Waddilove* v. *Taylor* (1848), 6 Hare, 307.

(*g*) Under the Court of Chancery Act, 1841 (5 Vict. c. 5), s. 4 (repealed in part by Statute Law Revision (No. 2) Act, 1888 (51 & 52 Vict. c. 57)), the Court of Chancery could in a summary manner, upon the application of any party interested, restrain the Bank of England or any other public company, whether incorporated or not, from permitting the transfer of any stock in the public funds, or any stock or shares in any public company, which might be standing in the name of any person, or from paying any dividend or dividends due or to become due thereon; and under s. 5 could issue the old Exchequer writ of *distringas* to effect a like purpose. By R. S. C., Ord. 46, r. 2, it was provided that no writ of *distringas* should be thereafter issued under s. 5 of the Act of 1841, and the simplified procedure by notice (see the text, *supra*) was substituted.

(*h*) The interest must be a beneficial one, and must be identified by reference to the document under which it arises; see form of affidavit, R. S. C., App. B, No. 27. A trustee holding stock can give the notice.

(*i*) The expression "company" includes the Governor and Company of the Bank of England and any other public company, whether incorporated or not, and the expression "stock" includes shares, securities, and dividends thereon (R. S. C., Ord. 46, r. 3).

(*k*) R. S. C., App. B, No. 27.

(*l*) *Ibid.*, No. 22.

(*m*) R. S. C., Ord. 46, r. 4. There shall be appended to the affidavit a note stating on whose behalf it is filed and to what address notices (if any) for that person are to be sent (*ibid.*, r. 5; for form, see *ibid.*, App. B, No. 22). All such notices shall be deemed to have been duly sent if sent through the post by a prepaid letter directed to that person at the address so stated, or at

SECT. 4. **Notice in lieu of Distringas.**

The notice in lieu of *distringas* is given simply for the purpose of preventing the stock or shares from being dealt with by the company without the person giving it having an opportunity of asserting his claim (*n*). Its effect is merely temporary, and if after it is given any other person claims to be entitled to deal with the stock or shares, and the company gives notice to the execution creditor to take proceedings to protect his right, the notice may be disregarded if he does not do so within eight days (*o*). The protective proceedings

any such substituted address as hereinafter mentioned, whether the person to whom the notice is sent is living or not (R. S. C., Ord. 46, r. 6). The address so stated may from time to time be altered by the person by or on whose behalf the affidavit is filed, but no notice sent by post before the alteration to the address originally given, or for the time being substituted therefor, shall be affected by any subsequent alteration. Any such alteration of address may be made by service of a memorandum thereof on the company in the manner required for service of a notice under this order (*ibid.*, r. 7). The original notice and a duplicate must be taken to the Filing Department for the original (annexed to the original affidavit) to be filed and the duplicate (annexed to the copy affidavit) sealed. No charge is made for sealing. Both must be signed by the deponent to the affidavit. When the deponent is a member of the firm of solicitors to the beneficiary the notices must be signed in his own name and not in that of the firm. Where the stock is standing in the name of one person the address must be given, but where it is standing in the names of two or more the addresses are not necessary. A separate notice should be filed for each company, but each notice may comprise any number of different stocks or shares.

(*n*) By R. S. C., Ord. 46, r. 8. The service of the office copy of the affidavit and of the duplicate of the filed notice has the same force and effect against the company as a writ of *distringas* duly issued under the Court of Chancery Act, 1841 (5 Vict. c. 5, s. 5) (now repealed), would have formerly had against the Bank of England. The effect was that after service on the Bank or company the writ prevented the stock or shares being transferred or dividends thereon paid without notice to the person who had obtained the writ, but if the person in whose name the stock or shares were standing requested the Bank or company to allow a transfer or to pay dividends, the Bank or company was not by force of the *distringas* authorised to refuse to remit such transfer or payment without an order of the court, for more than eight days from the date of the request (*Ex parte Amyot* (1841), 1 Ph. 130, n.). Under the Court of Chancery Act, 1841 (5 Vict. c. 5), s. 4, the court has power to restrain summarily the Bank or any public company from permitting the transfer of the stock in which the beneficial interest is alleged. The application may be by motion or petition, but is generally by motion. Where the stock stood in the name of a living and a deceased person, and the executor of the deceased person sought to restrain a transfer, he was directed to intitule the notice of motion also in the matter of the trust of the deceased's will (*Re Pike*, [1902] W. N. 42). The court usually grants an interim injunction over an early day, and directs the stockholders to be served (*ibid.*; *Re Blaksley's Trusts* (1883), 23 Ch. D. 549). A person claiming under a bequest to next of kin ascertainable at a future date has not an interest entitling him to an injunction under this section (*Re Ashton*, [1900] W. N. 109). Where the motion is *ex parte* the order is subject to the usual undertaking as to damages. The sole undertaking of a married woman will be accepted (*Re Prynne* (1885), 53 L. T. 465).

(*o*) *Ex parte Amyot, supra*; *Wilkins* v. *Sibley* (1863), 4 Giff. 442; *Peat* v. *Clayton*, [1906] 1 Ch. 659. The notice does not act as an injunction, but the party giving the notice must receive notice if anyone wishes to transfer the fund, and unless he then moves within a certain time (eight days, see R. S. C., Ord. 46, r. 10) the *distringas* is gone (*Hobbs* v. *Wayet* (1887), 36 Ch. D. 256, *per* KEKEWICH, J., at p. 260). The notice in lieu of *distringas* only prevents registration of a transfer of the shares (*Peat* v. *Clayton*, *supra*, *per* JOYCE, J., at p. 664). A company is not bound to take notice of mere equitable

consist of an injunction to restrain the company, which is granted upon an undertaking as to damages (*p*).

SECT. 4. Notice in lieu of Distringas.

The notice may be withdrawn (*q*), or the party issuing it may request the company to transfer notwithstanding it (*r*), or may file and serve a notice amended as to the description of the stock to be affected (*s*). The giving of the notice is not an election to take the shares, so that a legatee can disclaim shares after he has given notice (*t*).

SECT. 5.—*Equitable Execution.*

SUB-SECT. 1.—*Nature of Equitable Execution.*

Equitable relief.

208. Equitable execution, so called, is not, strictly speaking, a process of execution; it is rather a mode of relief granted to a judgment creditor on the ground that either no remedy by execution at law is open to him, or is likely to be effective owing to the peculiar nature of the property of the judgment debtor which it is sought to make available to answer the judgment (*a*). The process is based

interests in shares, and therefore simple notice to a company not to transfer without regard to an alleged equitable right may, in the absence of fraud, have no effect, so that it is always advisable to issue the prescribed notice under the above procedure; see *Société Générale de Paris* v. *Tramways Union Co.* (1884), 14 Q. B. D. 424, 453, C. A.

(*p*) *Re Blaksley's Trusts* (1883), 23 Ch. D. 549; *Re Prynne* (1885), 53 L. T. 465. The company need not be a party to the action between the person giving the notice and the claimant in order that the injunction may be granted If the company is unnecessarily made a party the action will be dismissed as against it with costs (*Edridge* v. *Edridge* (1818), 3 Madd. 386; *Perkins* v. *Bradley* (1842), 1 Hare, 219, 232). If an injunction is not applied for, the defendant in the action can apply for an order that the company do permit the transfer (*Ross* v. *Shearer* (1821), 5 Madd. 458; Madd. & G. 1).

(*q*) The filed notice may at any time be withdrawn by the person by whom or on whose behalf it was given, on a written request signed by him, or its operation may be made to cease by an order to be obtained by motion on notice, or by petition, or by summons at chambers duly served by any other person claiming to be interested in the stock sought to be affected by the notice (R. S. C., Ord. 46, r. 9). The Bank of England requires the signature to the request to be attested by a practising solicitor.

(*r*) If whilst the notice filed continues in force the company on whom it is served receive from the person in whose name the stock specified in the notice is standing, or from some person acting on his behalf or representing him, a request to permit the stock to be transferred or to pay the dividends thereon, the company shall not by force or in consequence of the service of the notice be authorised, without the order of the court or a judge, to refuse to permit the transfer to be made or to withhold the payment of the dividends for more than eight days after the date of the request (R. S. C., Ord. 46, r. 10). This is the appropriate remedy of a person having only an equitable interest in shares, and, therefore, not entitled to be recognised by the company (*Société Générale de Paris* v. *Tramways Union Co.*, *supra*, at p. 453, C. A.).

(*s*) R. S. C., Ord. 46, r. 11. If the person who files the notice desires to correct the description of the stock therein referred to he may file an amended notice and serve on the company a duplicate thereof, sealed with the seal of the Central Office, and in that case the service of the notice is deemed to have been made on the day on which the amended duplicate is so served.

(*t*) *Hobbs* v. *Wayet* (1887), 36 Ch. D. 256

(*a*) *Re Shephard, Atkins* v. *Shephard* (1889), 43 Ch. D. 131, C. A.; *Thompson* v. *Gill*, [1903] 1 K. B. 760, C. A.; *Wills* v. *Luff* (1888), 38 Ch. D. 197, 200; *Levasseur* v. *Mason and Barry*, [1891] 2 Q. B. 73, 77, C. A.; *Holmes* v. *Millage*, [1893] 1 Q. B. 551, C. A., *per* LINDLEY, L.J., at p. 554. The appointment of

SECT. 5. Equitable Execution.

upon the old practice of the Court of Chancery to assist in enforcing a judgment for the recovery of money of a court of ordinary jurisdiction by entertaining an application for the appointment of a receiver of such of the interests in property of the judgment debtor as could not, owing to the nature thereof, be taken under a common law writ of execution (*b*).

Present jurisdiction.

209. Since the Judicature Acts such relief may be granted by any division of the High Court (*c*), yet the jurisdiction to appoint a receiver by way of equitable execution is still in practice limited by the former practice of the Court of Chancery, and, as a general rule, a receiver will only be appointed in such circumstances as would have enabled the Court of Chancery before the Judicature Acts to have interfered by way of injunction or receiver at the suit of a judgment creditor, and the powers conferred upon the courts by the Judicature Acts, and the rules made thereunder, to appoint a receiver must, in relation to the appointment of a receiver by way of equitable execution, be read in the light of this overriding principle (*d*).

a receiver, however, may be a "taking in execution" within the meaning of a forfeiture clause (*Blackman* v. *Fysh*, [1892] 3 Ch. 209, C. A.); and see p. 124, *post*.

(*b*) Wherever equitable interests in property could not be reached by writs of execution issuable by the courts of common law by reason of prior or outstanding legal estates or interests, such as satisfied terms (*Kirby* v. *Dillon* (1824), 2 L. J. (o. s.) (CH.) 140), courts of equity gave relief by regarding those prior or outstanding estates or interests as incumbrances which a judgment creditor had the right to institute a suit to remove (*Neate* v. *Marlborough* (*Duke*) (1838), 3 My. & Cr. 407; *Anglo-Italian Bank* v. *Davies* (1878), 9 Ch. D. 275, C. A.). This suit was one for redemption, and in it the court could appoint a receiver and grant injunctions by way of ancillary relief. It may be advisable still in cases where the prior or outstanding legal incumbrancers are numerous or their accounts intricate, or it is desired to challenge them, to have recourse to such an action (*Beckett* v. *Buckley* (1874), L. R. 17 Eq. 435; *Wells* v. *Kilpin* (1874), L. R. 18 Eq. 298); see *Proskauer* v. *Siebe*, [1885] W. N. 159). The procedure is by originating summons under Ord. 55, r. 5A, or, if the desire is to ascertain priorities, by writ (*Re Giles, Real and Personal Advance Co.* v. *Michell* (1890), 43 Ch. D. 391, C. A.). "Courts of equity will also lend their aid to enforce the judgments of courts of ordinary jurisdiction; and therefore a bill may be brought to obtain the execution or the benefit of an *elegit* or a *fieri facias*, when defeated by a prior title, either fraudulent or not extending to the whole interest of the debtor in the property upon which the judgment is proposed to be executed. In some cases, where courts of equity formerly lent their aid, the legislature has, by express statute, provided for the relief of creditors in the courts of common law, and consequently rendered the exertion of this jurisdiction in such cases unnecessary. In any case, to procure relief in equity, the creditor must show by his bill that he has proceeded at law to the extent necessary to give him a complete title" (Mitford on Pleadings, 5th ed. (1847), p. 148 [126]). See observations of JESSEL, M.R., in *Anglo-Italian Bank* v. *Davies* (1878), 9 Ch. D. 275, C. A., and in *Salt* v. *Cooper* (1880), 16 Ch. D. 544, C. A.; and of DAVEY, L.J., in *Harris* v. *Beauchamp Brothers*, [1894] 1 Q. B. 801, C. A., at pp. 807 *et seq.*

(*c*) And by the county courts (*R.* v. *Lincolnshire County Court Judge* (1887), 20 Q. B. D. 167; *R.* v. *Selfe*, [1908] 2 K. B. 121; and see title COUNTY COURTS, Vol. VIII., pp. 435, 505). As to the general jurisdiction to appoint receivers, see title RECEIVERS.

(*d*) *Aslatt* v. *Southampton Corporation* (1880), 16 Ch. D. 143; *Manchester and Liverpool District Banking Co.* v. *Parkinson* (1888), 22 Q. B. D. 173, C. A.; *Holmes* v. *Millage*, [1893] 1 Q. B. 551, C. A.; *Harris* v. *Beauchamp Brothers*,

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Legal execution must not be available.

210. Primarily, therefore, before a receiver can be appointed to enforce a judgment, and whether of real estate or personal property, there must be some legal impediment to the issue of execution in the ordinary course of law, whether by writ of *fieri facias*, or *elegit*, or by means of garnishee proceedings or charging orders (*e*); but, subject to this, the remedy is available in the case of a judgment or order for the payment of a sum of money (*f*), or, in lieu of sequestration or attachment, to enforce an order for payment of money into court (*g*), and is not necessarily confined to the equitable estates or interests of the judgment debtor (*h*). In a proper case the court may appoint a receiver although the legal remedy against the legal property of the judgment debtor has not been exhausted (*i*), but as a general rule a receiver will not be appointed if a method of legal execution is available (*k*), and an appointment cannot be made in respect of property which previously to the Judicature Acts was not either at law or in equity liable to be taken in execution (*l*).

Other modes of equitable execution.

211. The appointment of a receiver is not the only method of equitable execution; a charging order over a fund in court or in

[1894] 1 Q. B. 801, C. A.; *Edwards & Co., Ltd.* v. *Picard*, [1909] 2 K. B. 903, C. A. (FLETCHER MOULTON, L.J., dissenting); see also R. S. C., Ord. 42, r. 3. For the appointment, duties, powers, and liabilities of receivers generally, see title RECEIVERS. As to receivers of partnership property, see p. 11, *ante*, and titles PARTNERSHIP; RECEIVERS. As to receivers in debenture-holders' actions, see title COMPANIES, Vol. V., pp. 376 *et seq.* As to receivers of railway property, see title RAILWAYS AND CANALS.

(*e*) See cases cited in notes (*a*) to (*c*), pp. 115, 116, *ante*.

(*f*) *Oliver* v. *Lowther* (1880), 42 L. T. 47 (alimony). No money is payable under an order for foreclosure absolute (*Wills* v. *Luff* (1888), 38 Ch. D. 197).

(*g*) Notwithstanding that sequestration is the appropriate remedy (*Stanger Leathes* v. *Stanger Leathes*, [1882] W. N. 71; *Re Whiteley, Whiteley* v. *Learoyd* (1887), 56 L. T. 846; *Re Coney, Coney* v. *Bennett* (1885), 29 Ch. D. 993; *Re Pemberton, Pemberton* v. *Royal Hospital for Incurables*, [1907] W. N. 118); see p. 79, *ante*.

(*h*) Under the jurisdiction given by s. 25 (8) of the Judicature Act, 1873 (36 & 37 Vict. c. 66), to appoint a receiver in all cases where it appears "just or convenient" to do so, a receiver has been appointed of a legal interest in land which could not conveniently be taken under a writ of *elegit* (*Re Pope* (1886), 17 Q. B. D. 743, C. A.); see also *Orr* v. *Grierson* (1890), 28 L. R. Ir. 20, C. A. (gales or head rents); *Pease* v. *Fletcher* (1875), 1 Ch. D. 273.

(*i*) *Hills* v. *Webber* (1901), 17 T. L. R. 513, C. A., *per* STIRLING, L.J., at p. 514. It appears to have been held that the fact that there is other property of the judgment debtor which might be taken in legal execution is immaterial in regard to the granting of equitable execution by appointment of a receiver over property which cannot be reached by legal execution (*Willis* v. *Cooper* (1900), 44 Sol. Jo. 698; but see *Manchester and Liverpool District Banking Co.* v. *Parkinson* (1888), 22 Q. B. D. 173, C. A.). Where judgment debtors were out of the jurisdiction, and it was impossible to prove the amounts of debts due to them in order to found garnishee proceedings, the court appointed a receiver by way of equitable execution (*Goldschmidt* v. *Oberrheinische Metallwerke*, [1906] 1 K. B. 373, C. A.); see also Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8); and p. 118, *post*.

(*k*) See *Harris* v. *Beauchamp Brothers*, *supra*; *Willis* v. *Cooper* (1900), 44 Sol. Jo. 698; *Manchester and Liverpool District Banking Co.* v. *Parkinson*, *supra*; *Re Shephard, Atkins* v. *Shephard* (1889), 43 Ch. D. 131, C. A.; *Goldschmidt* v. *Oberrheinische Metallwerke*, *supra*; *Holmes* v. *Millage*, [1893] 1 Q. B. 551, C. A.; *Edwards & Co., Ltd.* v. *Picard*, *supra*; and *Hills* v. *Webber*, *supra*.

(*l*) See cases cited in note (*i*), *supra*.

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the hands of a receiver, to which the debtor is entitled (*m*), and the grant of an injunction (*n*), are other forms of the remedy.

SUB-SECT. 2.—*When a Receivership Order may be made.*

Cases where a receiver has been appointed

212. Since a receiver may be appointed in any case where it shall appear to the court to be just or convenient to do so (*o*), it is almost impossible to enumerate or classify the cases in which the court may exercise its discretion.

The simplest and most usual cases of the appointment of a receiver are those where the judgment debtor has mortgaged his land so as to pass the legal estate to the mortgagee. The equity of redemption which belongs to him cannot be taken under an *elegit* (*p*), but can be reached by a receiver (*q*).

Where there is a clear and simple trust of land for the judgment debtor it can be taken under an *elegit*, and the appointment of a receiver is not appropriate, but it is appropriate where there are several incumbrances of an equitable interest (*r*).

Where the judgment debtor has contracted to sell real or leasehold property a receiver of his interest under the contract may be appointed, but this is subject to the risk that if the contract is rescinded the appointment may be ineffective (*a*). A receiver may be appointed of a judgment debtor's reversionary interest in the proceeds of sale of realty (*b*).

A receiver of debts may be appointed in lieu of garnishee proceedings in special circumstances (*c*), but not where a sum of money is in a bailee's hands and could be seized under a *fieri facias* (*d*). Such an appointment is the appropriate method of execution where

(*m*) *Brereton* v. *Edwards* (1888), 21 Q. B. D. 488, C. A.; *Re Cardus, Armstrong* v. *Paris*, [1888] W. N. 17; and see pp. 101—109, *ante*, as to charging orders generally.

(*n*) *Thornton* v. *Finch* (1864), 4 Giff. 515; *Bullus* v. *Bullus* (1910), 102 L. T. 399 (restraining payment of legacy to party who failed to obey order for costs); and see title INJUNCTION.

(*o*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8); but see p. 116, *ante*, as to the restrictive principle.

(*p*) See p. 65, *ante*.

(*q*) *Burden* v. *Kennedy* (1757), 3 Atk. 739; *Smith* v. *Cowell* (1880), 6 Q. B. D. 75, C. A.; *Salt* v. *Cooper* (1880), 16 Ch. D. 544, C. A.; and see *Hatton* v. *Haywood* (1874), 9 Ch. App. 229; *Anglo-Italian Bank* v. *Davies* (1878), 9 Ch. D. 275, C. A.; *Backhouse* v. *Siddle* (1878), 38 L. T. 487.

(*r*) *Wells* v. *Kilpin* (1874), L. R. 18 Eq. 298.

(*a*) *Ridout* v. *Fowler*, [1904] 2 Ch. 93, C. A.

(*b*) In the case of a receiver of personalty, the appointment has the effect of an injunction (*Tyrrell* v. *Painton*, [1895] 1 Q. B. 202, C. A.; *Re Jones and the Judgments Act*, 1864, [1895] W. N. 123 (copyholds)).

(*c*) *Goldschmidt* v. *Oberrheinische Metallwerke*, [1906] 1 K. B. 373, C. A. In this case the defendants, a German company, had no property within the jurisdiction available to any ordinary process of execution. Certain persons in England were indebted to the defendants, but the plaintiff had no means of ascertaining particulars of such debts, and therefore could not support garnishee proceedings. A receiver of the debts was appointed. A receiver of a Civil Service pension was appointed in *Molony* v. *Cruise* (1892), 30 L. R. Ir. 99.

(*d*) *Morris* v. *Taylor* (1892), 32 L. R. Ir. 14, C. A.

a debt is payable to two persons jointly but the beneficial interest is in the judgment debtor (*e*).

A receiver may be appointed (*f*) of a legacy or a share of residue under a will (*g*) or of an interest under a settlement of personalty (*h*), even when reversionary (*i*), but there is no jurisdiction to make a declaration of charge over the interest in personalty in respect whereof the receiver has been appointed (*k*). The appointment, even with notice to the executors or trustees, does not make the judgment creditor a secured creditor under the Bankruptcy Acts (*l*) nor, until an order for payment by them, under the Companies Act in case of winding up (*m*). The order does not interfere with the possession of the trustees or executors; it simply puts the execution creditor into the place of the debtor to receive the money (*n*). If the judgment debtor under the terms of the settlement has no right to receive anything, a receiver cannot be appointed (*o*).

Where a debt is of a nature which cannot be attached under garnishee proceedings, a receiver may be appointed—for example, where it is payable by the Paymaster-General under an order (*p*).

In addition to the cases mentioned in the foregoing paragraphs and in the notes thereto, a receiver has been appointed by way of

(*e*) *O'Donovan* v. *Goggin* (1892), 30 L. R. Ir. 579. See *Macdonald* v. *Tacquah Gold Mines Co.* (1884), 13 Q. B. D. 535, C. A.

(*f*) *Re Potts, Ex parte Taylor*, [1893] 1 Q. B. 648, C. A.

(*g*) *Macnicoll* v. *Parnell* (1887), 35 W. R. 773; *Re M'Nulty, M'Kenna* v. *Harley* (1893), 31 L. R. Ir. 391; *Re Anglesey (Marquis), de Galve (Countess)* v. *Gardner*, [1903] 2 Ch. 727. A share as next of kin under an intestacy can also be taken (*Mullane* v. *Ahern* (1891), 28 L. R. Ir. 105). An injunction will be granted to stop the executors parting with the money till the receiver can be properly appointed (*Archer* v. *Archer*, [1886] W. N. 66). Where the estate is being administered by the court the execution creditor should obtain a stop order (*Thomas* v. *Cross* (1865), 2 Drew. & Sm. 423; *Re Galland*, [1886] W. N. 96), as to which see p. 110, *ante*.

(*h*) *Oliver* v. *Lowther* (1880), 42 L. T. 47; *Webb* v. *Stenton* (1883), 11 Q. B. D. 518, C. A.; *Ideal Bedding Co., Ltd.* v. *Holland*, [1907] 2 Ch. 157.

(*i*) *Fuggle* v. *Bland* (1883), 11 Q. B. D. 711.

(*k*) *Flegg* v. *Prentis*, [1892] 2 Ch. 428; *De Peyrecave* v. *Nicholson* (1894), 10 R. 532. The effect is that of an injunction against the execution debtor (*Re Anglesey (Marquis), de Galve (Countess)* v. *Gardner, supra*). But the appointment of a receiver may upon the construction of the will effect a forfeiture of an interest under it (*Blackman* v. *Fysh* (1891), 60 L. J. (CH.) 666).

(*l*) *Re Potts, Ex parte Taylor, supra*.

(*m*) *Croshaw* v. *Lyndhurst Ship Co.*, [1897] 2 Ch. 154.

(*n*) *Re Peace and Waller* (1883), 24 Ch. D. 405, C. A.; *Arden* v. *Arden* (1885), 29 Ch. D. 702. Where the estate is being administered by the court the execution creditor can apply, apparently, in the action for an order for payment to the receiver (*Re Peace and Waller, supra*).

(*o*) *Whitaker* v. *Cohen* (1893), 69 L. T. 451; *R.* v. *Lincolnshire County Court Judge* (1887), 20 Q. B. D. 167; *Brown* v. *Dimbleby*, [1904] 1 K. B. 28, C. A.; *Birmingham Excelsior Money Society* v. *Lane*, [1904] 1 K. B. 35, C. A. Irrespective, in the case of a married woman restrained from anticipation, of when the restraint was removed (*Pelton Brothers* v. *Harrison*, [1891] 2 Q. B. 422, C. A.); *Jay* v. *Robinson* (1890), 25 Q. B. D. 467, C. A.).

(*p*) *Westhead* v. *Riley* (1883), 25 Ch. D. 413; though it may be possible also to reach such a debt by a charging order (*Brereton* v. *Edwards* (1888), 21 Q. B. D. 488, C. A.).

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equitable execution:—to enforce the payment of money ordered to be paid to a trustee in bankruptcy (*q*); in the case of a joint tenancy (*r*); of the separate estate of a married woman which she was not restrained from anticipating (*s*); of money standing in another court to which the judgment debtor was entitled (*t*); of rents and moneys arising from land situate out of the jurisdiction (*a*); of the judgment debtor's share of a testator's residuary personal estate, even though unascertained in amount (*b*); of a

(*q*) *Re Goudie, Ex parte Official Receiver*, [1896] 2 Q. B. 481.

(*r*) *Hills* v. *Webber* (1901), 17 T. L. R. 513, C. A.

(*s*) *Bryant* v. *Bull* (1879), 10 Ch. D. 153; *Re Peace and Waller* (1883), 24 Ch. D. 405, C. A.; *Perks* v. *Mylrea*, [1884] W. N. 64; *Hill* v. *Cooper*, [1893] 2 Q. B. 85, C. A. A receiver may also be appointed of the arrears of income which a married woman is restrained from anticipating, provided they have accrued due before the date of the judgment (*Hood Barrs* v. *Heriot*, [1896] A. C. 174; *Whiteley* v. *Edwards*, [1896] 2 Q. B. 48, C. A.; *Re Lumley, Ex parte Hood Barrs*, [1896] 2 Ch. 690, C. A.), but not where they have accrued due after the date of judgment (*Hood Barrs* v. *Cathcart*, [1894] 2 Q. B. 559, C. A.; *Whiteley* v. *Edwards*, *supra*; *Bolitho & Co., Ltd.* v. *Gidley*, [1905] A. C. 98). Where a plaintiff obtained leave to enter judgment under Ord. 14, and delayed entering judgment for three months when he knew that arrears had just become due and then entered judgment and obtained an order for a receiver, it was held by the Court of Appeal that an order ought not to have been made under such circumstances (*Colyer* v. *Isaacs* (1897), 77 L. T. 198, C. A.).

On a judgment against a married woman suing in respect of her separate estate that she should pay to the defendants their taxed costs to be payable out of her separate property and not otherwise, the court has jurisdiction, independently of s. 25 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), to protect by injunction or receiver the funds out of which the costs are payable, before they have been taxed (*Cummins* v. *Perkins*, [1899] 1 Ch. 16, C. A.). Where a judgment is recovered against a married woman in the form of *Scott* v. *Morley* (1887), 20 Q. B. D. 120, C. A., a receiver cannot be appointed to receive the income of funds to which she is entitled without power of anticipation (*Brown* v. *Dimbleby*, [1904] 1 K. B. 28, C. A., following *Barnett* v. *Howard*, [1900] 2 Q. B. 784, C. A.; see also *Whitaker* v. *Cohen* (1893), 69 L. T. 451, where the court refused to appoint a receiver of furniture in which a married woman had a life interest under a settlement). Nor can a judgment obtained against her in respect of a debt contracted before her marriage or second marriage be enforced in this way against her separate property subject to restraint against anticipation, where the restriction is not contained in a settlement or agreement for a settlement of her own property made or entered into by herself (*Birmingham Excelsior Money Society* v. *Lane*, [1904] 1 K. B. 35, C. A.). But where the restraint is contained in such a settlement a receiver may be appointed (*Jay* v. *Robinson* (1890), 25 Q. B. D. 467, C. A.). The subsequent death of the husband, though it removes the restraint, does not allow of the appointment of a receiver of any separate property she had during the coverture, where the judgment was obtained during the coverture against her separate estate not subject to any restriction against anticipation (*Pelton Brothers* v. *Harrison*, [1891] 2 Q. B. 422, C. A.), though a receiver may be appointed of separate property which the judgment debtor acquired through a second marriage (*Jay* v. *Robinson*, *supra*); see also *Hill* v. *Cooper*, *supra*, where it was held that the property of a married woman subject to the restraint, who had been deserted by her husband and had obtained a protection order under the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), could not be reached by the appointment of a receiver, since the restraint still attached.

(*t*) *Westhead* v. *Riley* (1883), 25 Ch. D. 413.

(*a*) *Mercantile Investment and General Trust Co.* v. *River Plate Trust, Loan and Agency Co.*, [1892] 2 Ch. 303. But the order will not be made if the court is of opinion that the appointment of a receiver will be useless (*ibid.*).

(*b*) *Re Anglesey* (*Marquis*), *de Galve* (*Countess*) v. *Gardner*, [1903] 2 Ch. 727.

bailor's interest in goods bailed, subject to any lien of the bailee (*c*); of leasehold property subject to a mortgage (*d*); and of the equity of redemption under a bill of sale (*e*).

Cases where a receiver has been refused.

213. A receiver will not be appointed by way of equitable execution of untaxed costs (*f*); of future earnings (*g*); of rents, profits, and moneys receivable in respect of an interest in patents (*h*); of a sum the payment of which to the debtor is wholly contingent and dependent on the will of another person (*i*); of the judgment debtor's property generally (*k*); of money which the judgment debtor cannot alienate (*l*); of book debts which have been got in by the judgment debtor who has spent the proceeds (*m*); or where the judgment creditor has commenced an action to administer the debtor's estate (*n*).

A receiver will not be appointed over another receiver: the proper order in such a case would seem to be for the extension of the power of the receiver already appointed (*o*).

Salaries and pensions.

214. A receiver may be appointed of the salary of a public servant which is actually due (*p*), but not of salary which is not due, when such salary cannot be assigned (*q*). When a pension has been made inalienable either by statute or the voluntary act of the pensioner a receiver of it cannot be appointed (*r*),

(*c*) *Levasseur* v. *Mason and Barry*, [1891] 2 Q. B. 73, C. A. But see R. S. C., Ord. 57, r. 12; p. 52, *ante;* and title INTERPLEADER.

(*d*) See *Gore* v. *Bowser* (1855), 3 Sm. & G. 1; *Re Watkins, Ex parte Evans* (1879), 13 Ch. D. 252, C. A.; *Smith* v. *Cowell* (1880), 6 Q. B. D. 75, C. A.

(*e*) See *Re Dickinson, Ex parte Charrington & Co.* (1888), 22 Q. B. D. 187, C. A., *per* FRY, L.J., at p. 192. The usual practice, however, is to seize the goods under a *fi. fa.*

(*f*) *Willis* v. *Cooper* (1900), 44 Sol. Jo. 698; but as to receivers against the property of married women, see *Cummins* v. *Perkins*, [1899] 1 Ch. 16, C. A., and note (*s*), p. 120, *ante.*

(*g*) *Holmes* v. *Millage*, [1893] 1 Q. B. 551, C. A. (earnings of a journalist); *Cadogan* v. *Lyric Theatre, Ltd.*, [1894] 3 Ch. 338, C. A. (takings of a theatre); *Re Johnson*, [1898] 2 I. R. 551; see also *Hamilton* v. *Brogden* (No. 2), [1891] W. N. 36.

(*h*) *Edwards & Co.* v. *Picard*, [1909] 2 K. B. 903, C. A. (FLETCHER MOULTON, L.J., dissenting).

(*i*) *R.* v. *Lincolnshire County Court Judge* (1887), 20 Q. B. D. 167.

(*k*) *Hamilton* v. *Brogden*, [1891] W. N. 14.

(*l*) As, for instance, a weekly sum payable to a wife under the order of a court of summary jurisdiction (*Paquine* v. *Snary*, [1909] 1 K. B. 688, C. A.).

(*m*) *Harper* v. *McIntyre* (1907), 51 Sol. Jo. 701.

(*n*) *Re Cave, Mainland* v. *Cave*, [1892] W. N. 142, C. A.; but see *Waddell* v. *Waddell*, [1892] P. 226; *Re Shephard, Atkins* v. *Shephard* (1889), 43 Ch. D. 131, C. A.

(*o*) *Valle* v. *O'Reilly* (1824), 1 Hog. 199.

(*p*) *Picton* v. *Cullen*, [1900] 2 I. R. 612, C. A.

(*q*) *Re Huggins, Ex parte Huggins* (1882), 21 Ch. D. 85, C. A.; *Re Mirams*, [1891] 1 Q. B. 594. It has been held that the salary of a clerk of petty sessions in Ireland, who is a public and judicial officer (*M'Creery* v. *Bennett*, [1904] 2 I. R. 69), and the salary of an assistant parliamentary counsel to the Treasury (*Cooper* v. *Reilly* (1829), 2 Sim. 560), and the salary of a clerk of the peace (*Palmer* v. *Bate* (1821), 2 Brod. & Bing. 673) cannot be assigned. Nor can a pension granted partly for some continuing duty or service be assigned (*Wells* v. *Foster* (1841), 8 M. & W. 149, 152).

(*r*) *Lucas* v. *Harris* (1886), 18 Q. B. D. 127, C. A.; *Crowe* v. *Price* (1889), 22

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but where the pension is not inalienable a receiver may be appointed (*s*).

SUB-SECT. 3.—*Appointment of a Receiver.*

The application.

215. It is not necessary to institute a fresh action to obtain the benefit of equitable execution (*t*). An application for the appointment of a receiver is made on motion or summons in the action in which the judgment or order was obtained (*a*).

In the King's Bench Division the application is made to the master in chambers (*b*), or where the original proceedings were in a district registry to the district registrar (*c*). In the Chancery Division it is the practice to apply by motion, *ex parte* or on notice, as the case may require (*d*). If the application is made by a

Q. B. D. 429, C. A. A receiver may be appointed in respect of a sum arising from commutation of an officer's retired pay (*ibid.*).

(*s*) *Manning* v. *Mullins*, [1898] 2 I. R. 34, C. A.

(*t*) See *Re Watkins, Ex parte Evans* (1879), 13 Ch. D. 252, C. A.; *Re Peace and Waller* (1883), 24 Ch. D. 405, C. A.

(*a*) R. S. C., Ord. 50, r. 6; *Smith* v. *Cowell* (1880), 6 Q. B. D. 75, C. A.; *Salt* v. *Cooper* (1880), 16 Ch. D. 544, C. A.; *Holmes* v. *Millage*, [1893] 1 Q. B. 551, C. A. For form of summons, see R. S. C., App. K, No. 261, and Chitty's Forms, pp. 222, 440. The appointment of a receiver cannot be obtained by executors of a deceased judgment creditor under an order to carry on proceedings under R. S. C., Ord. 42, r. 23 (*Norburn* v. *Norburn*, [1894] 1 Q. B. 448; and see *De la Pole* (*Lady*) v. *Dick* (1885), 29 Ch. D. 351, C. A.; *Re Greer, Napper* v. *Fanshawe*, [1895] 2 Ch. 217). A solicitor whose costs have been taxed at the instance of his client may apply summarily for a receivership order (*Re Peace and Waller, supra*). An appointment of a receiver by way of equitable execution may be made upon the certificate of a decreet of the Court of Session in Scotland registered in the High Court under the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54) (*Thompson* v. *Gill*, [1903] 1 K. B. 760, C. A.).

(*b*) R. S. C., Ord. 54, r. 12 (*e*). In practice the application to the master is usually made *ex parte* in the first instance. The affidavit in support (see p. 123, *post*) is laid before the practice master, who, if a sufficient case is made out, usually directs a summons to issue. The order is rarely, if ever, made without a summons. The master may at the same time that he directs the summons to issue grant an injunction restraining the judgment debtor from dealing with the property pending the return of the summons. Such an injunction, however, will not be granted as a matter of course (*Lloyds Bank, Ltd.* v. *Medway Upper Navigation Co.*, [1905] 2 K. B. 359, C. A.); the affidavit must show some special reason for it, such, for instance, as facts showing that the judgment debtor will probably make away with the property unless restrained. If granted, the injunction is incorporated in the summons.

(*c*) R. S. C., Ord. 35, r. 6.

(*d*) *Blackborough* v. *Ravenhill* (1852), 16 Jur. 1085; *Booth* v. *Coulton* (1868), 16 W. R. 683; *Re Francke, Drake* v. *Francke* (1888), 57 L. J. (CH.) 437; *Fuggle* v. *Bland* (1883), 11 Q. B. D. 711; *Evans* v. *Lloyd*, [1889] W. N. 171. It has been doubted whether the application should not, as a rule, be made in chambers (*Re Hartley, Nuttall* v. *Whittaker* (1892), 66 L. T. 588). Unless in special circumstances an order will not be made upon an *ex parte* application, but in cases of emergency an order may be so made (see *Re Potts, Ex parte Taylor*, [1893] 1 Q. B. 648, 662, C. A.; *Re H.'s Estate* (1875), 1 Ch. D. 276; *Taylor* v. *Eckersley* (1876), 2 Ch. D. 302, C. A.; *Re Pountain* (1888), 37 Ch. D. 609, C. A.; *Re Shephard, Atkins* v. *Shephard* (1889), 43 Ch. D. 131, C. A.; *Lucas* v. *Harris* (1887), 18 Q. B. D., 126, 134, C. A.; *Minter* v. *Kent, Sussex and General Land Society* (1895), 72 L. T. 186, C. A.; *Re Goudie, Ex parte Official Receiver*, [1896] 2 Q. B. 481). The usual practice is to apply *ex parte* on affidavit for a summons and injunction against the defendant assigning or dealing with the property till the hearing of the summons. An undertaking in damages must be given upon an *ex parte* order which includes an interim injunction.

party other than the plaintiff, notice thereof must be given to the plaintiff (*e*). SECT. 5. Equitable Execution.

216. Where no appearance has been entered in the action and judgment has been obtained by default, the summons cannot be served by being filed in default, but should be personally served on the judgment debtor (*f*). Personal service, however, is not strictly insisted on if it is shown that the summons has come to the knowledge of the debtor. Service.

217. The application must be supported by an affidavit, which should state the amount due on the judgment, and that there is not sufficient property available by ordinary execution, and should describe the property and the nature of the debtor's interest therein in respect of which the appointment of a receiver is asked, and that it is of value, and the sum that the receiver will probably obtain (*g*). It should also show the fitness of the person proposed as receiver (*h*). Affidavit in support.

218. A receiver may be appointed by an interlocutory order in all cases in which it appears to the court to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the court shall think fit (*i*). The order.

Further, in every case in which an application is made for the appointment of a receiver by way of equitable execution, the court or a judge, in determining whether it is just or convenient that such appointment should be made, must have regard to the amount of the debt claimed by the applicant, to the amount which may probably be obtained by the receiver, and to the probable costs of his appointment, and may, if they or he shall so think fit, direct any inquiries on those or other matters before making the appointment (*k*).

If the amount of the judgment debt is so small as not to warrant the expense of an appointment, an order will not be made (*l*).

An *ex parte* injunction restraining any dealing with the property until the return of the summons will not be granted in the absence of proof of danger that the property will be made away with by the judgment debtor (*Lloyds Bank, Ltd.* v. *Medway Upper Navigation Co.*, [1905] 2 K. B. 359, C. A.).

(*e*) R. S. C., Ord. 50, r. 6.

(*f*) *Tilling, Ltd.* v. *Blythe*, [1899] 1 Q. B. 557, C. A. The summons could not formerly be served out of the jurisdiction (*Weldon* v. *Gounod* (1885), 15 Q. B. D. 622); but since R. S. C., Ord. 11, r. 8A, it can; see title PRACTICE AND PROCEDURE.

(*g*) See *Smith* v. *Carter*, *Ex parte Smith* (1888), 52 J. P. 615; *I.* v. *K.*, [1884] W. N. 63.

(*h*) For forms of affidavit, see Chitty's Forms, pp. 437—439.

(*i*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8). The power to appoint is entirely discretionary. For form of order of appointment, see R. S. C., App. K, No. 26J.

(*k*) R. S. C., Ord. 50, r. 15A. In the construction of the R. S. C., unless there is anything in the subject or context repugnant thereto, the word "receiver" includes consignee or manager appointed by order of the court (R. S. C., Ord. 71, r. 1).

(*l*) *I.* v. *K.*, [1884] W. N. 63. As a general rule a receiver will not be appointed when the judgment debt is under £30; but the matter is entirely one for the discretion of the judge or master. Sometimes an order is made conditional on the judgment creditor having no costs of the receivership.

SECT. 5. Equitable Execution.

Appeal.

219. An appeal lies to the judge in chambers from the decision of the master. From the decision of the judge an appeal lies to the Court of Appeal (*m*).

County court.

220. A county court judge has jurisdiction to appoint a receiver by way of equitable execution (*n*).

The receiver.

221. The court has an entire discretion as to the person to be appointed receiver and the terms of his appointment. It is common practice where the judgment is for under £50 to appoint the judgment creditor, who then acts without remuneration and without giving security (*o*). If a stranger is appointed he must give security, except where the judgment is for less than £50, in which case the judgment creditor must undertake to be answerable for the money received by the receiver (*p*). The solicitor of the judgment creditor will not be appointed (*q*).

Accounts.

222. The usual order directs the receiver to pass his accounts and pay such sums as are certified by the master as proper to be paid (*r*), and to pay the balance to the judgment creditor for his debt (*s*). The costs of the receiver's appointment are usually payable out of his receipts (*a*).

SUB-SECT. 4.—*Effect of a Receivership Order* (*b*).

As regards interest in land.

223. Upon the order being made appointing a receiver of an

(*m*) Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 1. No leave to appeal is necessary (*ibid.*, s. 1 (4) (b) (ii)).

(*n*) *R.* v. *Lincolnshire County Court Judge* (1887), 20 Q. B. D. 167; *R.* v. *Selfe*, [1908] 2 K. B. 121; see title COUNTY COURTS, Vol. VIII., pp. 433, 505.

(*o*) *Hewett* v. *Murray* (1885), 54 L. J. (CH.) 572; *Fuggle* v. *Bland* (1883), 11 Q. B. D. 711; *Macnicoll* v. *Parnell* (1888), 35 W. R. 773.

(*p*) *Hewett* v. *Murray*, *supra*. When a stranger is appointed, he will not be obliged to give security when the appointment is made in respect of land and he is not intended to receive the rents and profits. But in such case both the judgment creditor and the receiver must undertake not to act without the leave of the court (*ibid.*). In the case of debts between £50 and £100 in amount the usual order limits the costs of the appointment, and the receiver's poundage, costs of giving security, and all other costs are limited to 10 per cent. of the amount of the judgment. In the case of debts under £50 the plaintiff is made by the order responsible for the receiver's acts, and security is not required unless the amount received is greater than the judgment debt and the costs of the order in such a case are limited to £4. As to the regulations in force in the King's Bench Division, see Yearly Practice of the Supreme Court, 1911, pp. 693, 695. In other respects the law governing the appointment, security, remuneration, duties, powers, and responsibilities of a receiver appointed by way of equitable execution are the same as in the case of an ordinary receiver, for which see title RECEIVERS.

(*q*) See *Re Lloyd*, *Allen* v. *Lloyd* (1879), 12 Ch. D. 447, C. A.

(*r*) The receiver's remuneration is decided under this; see title RECEIVERS.

(*s*) The execution creditor's solicitor has no authority to receive the money (*Ind, Coope & Co., Ltd.* v. *Kidd* (1894), 10 R. 528).

(*a*) The form of order which directs the judgment debtor to pay the costs on a deficiency appears questionable. They are costs of enforcing the creditor's security. Such costs are not, according to the practice of the Chancery Division, made payable as a debt by a mortgagor.

(*b*) As to the effect of an act of bankruptcy committed by the judgment debtor upon an order for the appointment of a receiver by way of equitable execution, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 271 *et seq.*

interest in land, it should be registered (*c*), and when this is effected, and not until then, it operates as a delivery in execution so as to entitle the judgment creditor to a charge over the land (*d*). He thereupon becomes entitled, on issuing an originating summons, to an order for sale of the debtor's interest (*e*).

As regards personalty.

224. The appointment of a receiver of personal estate does not create a charge on the property (*f*), nor does notice of the appointment confer any priority (*g*); but the order prevents the judgment debtor from receiving the property or from dealing with it to the prejudice of the judgment creditor (*h*), and, having appointed a receiver, the court will grant whatever injunction is necessary to prevent the debtor's property being received by a subsequent assignee to the prejudice of the judgment creditor (*i*).

The receiver's title to receive money issuing out of personal estate is not complete until he has given the security, if any, ordered by the court (*k*).

The title of the judgment creditor to money or goods in the hands of the receiver accrues from the date of the order appointing the receiver (*l*).

The appointment of a receiver of personal estate by way of equitable execution gives no power to sell the personalty in order to satisfy the judgment debt (*m*).

(*c*) Land Charges Act, 1900 (63 & 64 Vict. c. 26), s. 2; see p. 70, *ante*.

(*d*) *Hatton* v. *Haywood* (1874), 9 Ch. App. 229; *Backhouse* v. *Siddle* (1878), 38 L. T. 487. Notwithstanding that his security is not completed (*Re Watkins, Ex parte Evans* (1879), 13 Ch. D. 252, C. A.). The decision in *Thornton* v. *Finch* (1864), 4 Giff. 515, was that an injunction would be granted on the application of a judgment creditor against mortgagees of the judgment debtor who were about to sell, paying the surplus proceeds to him. The case is the subject of comment by Lord SELBORNE in *Hatton* v. *Haywood, supra;* and see *Re Harrison and Bottomley*, [1899] 1 Ch. 465. As to the effect of a judgment upon the lands of the judgment debtor, see title JUDGMENTS AND ORDERS.

(*e*) The right to a sale and the procedure to obtain it are the same as in the case of an *elegit* (see p. 70, *ante*). The interest under an equitable execution is only an equitable interest, so that the execution creditor is usually well advised to frame his summons by making prior incumbrancers parties and asking for redemption as well as a sale. Judgment creditors who have not issued execution are not necessary parties (*Cork* (*Earl*) v. *Russell* (1871), 20 W. R. 164). The whole legal and equitable estate in the land can then in a proper case be ordered to be sold; see Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 25. As to parties, see *Mildred* v. *Austin* (1869), L. R. 8 Eq. 220.

(*f*) *Re Dickinson, Ex parte Charrington & Co.* (1888), 22 Q. B. D. 187, C. A.; *Re Potts, Ex parte Taylor*, [1893] 1 Q. B. 648, C. A.; *Flegg* v. *Prentis*, [1892] 2 Ch. 428.

(*g*) *Arden* v. *Arden* (1885), 29 Ch. D. 702, 709.

(*h*) *Re Anglesey* (*Marquis*), *de Galve* (*Countess*) v. *Gardner*, [1903] 2 Ch. 727; *Tyrrell* v. *Painton*, [1895] 1 Q. B. 202, 206, C. A.; *Levasseur* v. *Mason and Barry*, [1891] 2 Q. B. 73, 80, C. A.

(*i*) *Ideal Bedding Co., Ltd.* v. *Holland*, [1907] 2 Ch. 157.

(*k*) *Edwards* v. *Edwards* (1876), 2 Ch. D. 291, C. A.; *Ridout* v. *Fowler*, [1904] 2 Ch. 93, C. A. But the title of the receiver relates back to the date when the order for his appointment was made (*Levasseur* v. *Mason and Barry, supra*). As to the receiver's title, see also *Re Stanhope Silkstone Collieries Co.* (1879), 11 Ch. D. 160, C. A.; *Croskaw* v. *Lyndhurst Ship Co.*, [1897] 2 Ch. 154.

(*l*) *Levasseur* v. *Mason and Barry, supra*.

(*m*) *De Peyrecave* v. *Nicholson* (1894), 71 L. T. 255; *Flegg* v. *Prentis, supra*.

SECT. 5. Equitable Execution.

Priorities.

225. The appointment of a receiver, whether of real or personal property, is always expressed in the order to be without prejudice to the rights of prior incumbrancers to remain in possession or to take possession of the affected property (*n*). The appointment of a receiver has not the effect of putting the property received *in custodia legis* (*o*), so that, apart from this provision in the order, a prior incumbrancer would have no right to what the receiver obtains (*p*).

The order if made in respect of personal estate does not make the judgment creditor a secured creditor within the meaning of the Bankruptcy Act, 1883 (*q*), but a judgment creditor who has obtained equitable execution against realty is a secured creditor (*r*).

Part VI.—Discovery in aid of Execution.

Examination as to means: (1) When judgment for recovery or payment of money.

226. When a judgment or order is for the recovery or payment of money, the judgment debtor (or any officer of a corporation which is the judgment debtor) may, by order of the court or a judge, be orally examined as to means to satisfy the judgment (*s*). Under this rule is included a married woman, although the judgment against her is limited to her separate estate (*a*), and a garnishee under a garnishee order absolute (*b*). The permission to examine officers of a corporation applies *primâ facie* to the secretary (*c*), but, if the court think fit, extends to all other officers and to persons who have been officers of the corporation (*d*). No other person can be so examined (*e*).

(*n*) But if not in possession they must obtain the leave of the court to interfere with the receiver by taking possession (*Ames* v. *Birkenhead Docks* (*Trustees*) (1855), 20 Beav. 332; *Searle* v. *Choat* (1884), 25 Ch. D. 723, C. A.). The question of the validity of the incumbrance can be gone into on the application, and if it is upheld the receiver may be ordered to pay what he has received to the incumbrancer and be discharged (*Walmsley* v. *Mundy* (1884), 13 Q. B. D. 807, C. A.). As to the priority of a charging order on a fund in court over a receiver, see *Fahey* v. *Tobin*, [1901] 1 I. R. 511, C. A.

(*o*) See *Re Sutton, Sutton* v. *Rees* (1863), 32 L. J. (CH.) 437, *per* KINDERSLEY, V.-C., at p. 438.

(*p*) *Re Hoare, Hoare* v. *Owen*, [1892] 3 Ch. 94. A receiver is, however, a trustee of money received by him in that capacity for those entitled (*Seagram* v. *Tuck* (1881), 18 Ch. D. 296).

(*q*) *Re Dickinson, Ex parte Charrington & Co.* (1888), 22 Q. B. D. 187, C. A.; *Re Potts, Ex parte Taylor*, [1893] 1 Q. B. 648, C. A.; *Croshaw* v. *Lyndhurst Ship Co.*, [1897] 2 Ch. 154; *Tyrrell* v. *Painton*, [1895] 1 Q. B. 202, C. A.; *Arden* v. *Arden* (1885), 29 Ch. D. 702; *Ridout* v. *Fowler*, [1904] 2 Ch. 93, C. A.; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 224, as to secured creditors.

(*r*) *Re Watkins, Ex parte Evans* (1879), 13 Ch. D. 252, C. A.

(*s*) R. S. C., Ord. 42, r. 32.

(*a*) *Aylesford* (*Countess*) v. *Great Western Rail. Co.*, [1892] 2 Q. B. 626, C. A.

(*b*) *Cowan & Co.* v. *Carlill* (1885), 52 L. T. 431; but not where the order is only *nisi* and the garnishee disputes liability (*Jeffris* v. *Tomlinson* (1886), 3 T. L. R. 193).

(*c*) See *A.-G.* v. *North Metropolitan Tramways Co.*, [1892] 3 Ch. 70; *Chaddock* v. *British South Africa Co.*, [1896] 2 Q. B. 153, 155, C. A.; *Manchester Val de Travers Paving Co.* v. *Slagg*, [1882] W. N. 127, C. A.

(*d*) *Société Générale du Commerce et de l'Industrie en France* v. *Farina* (*Johann Maria*) *& Co.*, [1904] 1 K. B. 794, 797, C. A.

(*e*) *Irwell* v. *Eden* (1887), 18 Q. B. D. 588, C. A.; *Hood Barrs* v. *Heriot*,

The order will be made upon application by summons before a master in chambers (*f*) and must usually be served personally (*g*). It is enforceable by attachment (*h*). Unless the debtor is examined at his own house he is entitled to conduct money (*i*), but not to a witness's expenses (*k*).

The examination takes place before a master (*l*), and a cross-examination of the severest kind is allowed so long as it is directed to the questions of what, if any, debts are due to the debtor, or what, if any, other property or means of satisfying the judgment or order he may have (*m*). The master has, however, a discretion as to the questions to be answered, and will not, for example, allow an examination for the purpose of extracting evidence for another case (*n*).

(2) In other cases.

227. If any difficulty should arise in or about the execution or enforcement of any judgment or order other than for the recovery or payment of money, any party interested may apply to the court or a judge who is empowered to make such order thereon for the attendance and examination of any party, or as may be just (*o*).

Costs.

228. The costs of any application for the examination of a debtor or person against whom property has been recovered, and of any proceedings arising from or incidental thereto, are in the discretion

Ex parte Blyth, [1896] 2 Q. B. 338, C. A., notwithstanding the wording of R. S. C., Ord. 42, r. 32.

(*f*) An affidavit of service of the summons will be required if the debtor do not appear at the hearing, in person or by solicitor. If he has entered no appearance in the action the summons will be served by service on the file under R. S. C., Ord. 67, r. 4, and an office copy of the summons will take the place of the affidavit.

(*g*) *Mason* v. *Muggeridge* (1856), 18 C. B. 642; but where it can be proved that the debtor knows of the order and is evading service, it may be enforced by attachment (*Kistler* v. *Tettmar*, [1905] 1 K. B. 39, C. A.). Not, however, merely on proof of knowledge of the order (*Re Tuck, Murch* v. *Loosemore*, [1906] 1 Ch. 692, C. A.)

(*h*) The order must be indorsed under R. S. C., Ord. 41, r. 5; see title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., p. 34.

(*i*) *Protector Endowment Co.* v. *Whitlam* (1877), 36 L. T. 467. The payment of conduct money is necessary to found an application for attachment for non-attendance under an order (*In the Goods of Harvey* (1907), 23 T. L. R. 433).

(*k*) *Rendell* v. *Grundy*, [1895] 1 Q. B. 16, C. A. The amount of conduct money payable is for the examiner (*ibid.*).

(*l*) In the King's Bench Division. Such examinations are rarely held in the Chancery Division, but usually take place before one of the official examiners of the court (*Hamilton* v. *Brogden*, [1891] W. N. 14). For the practice in the Probate, Divorce, and Admiralty Division, see *Townend* v. *Townend* (1905), 93 L. T. 680, C. A.; *In the Estate of Harvey* (*Hester*), [1907] W. N. 74.

(*m*) *Costa Rica Republic* v. *Strousberg* (1880), 16 Ch. D. 8, C. A.; *Watkins* v. *Ross* (1893), 68 L. T. 423, 425, C. A. But it is possible that from grounds of personal interest in a director of a company his examination will not be ordered (see *Manchester Val de Travers Paving Co.* v. *Slagg*, [1882] W. N. 127, C. A.).

(*n*) *Watkins* v. *Ross*, *supra*.

(*o*) R. S. C., Ord. 42, r. 33. But this has no application to an order of the Probate, Divorce and Admiralty Division under the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85) (*Hyde* v. *Hyde* (1888), 13 P. D. 166, C. A.).

PART VI. Discovery in aid of Execution.

of the court or a judge, or in the discretion of the examining officer if so directed (*p*).

Part VII.—Execution in Inferior Courts.

Liability of officers.

229. The liabilities and duties of the officers of inferior courts in the enforcement of writs or warrants in the nature of writs are the same at common law as those of the sheriff (*q*). Actions for negligence or trespass will accordingly lie against them for acts and omissions in the execution of their office. The liability of sheriffs and their officers and of bailiffs of inferior courts for extortion or misconduct is regulated by statute (*r*).

Palatine Courts.

230. The powers of the Palatine Courts of Lancaster and Durham to enforce within their respective jurisdictions their judgments and orders is co-extensive with the powers vested in the Supreme Court. The rules and orders of the Supreme Court have been adopted in both Palatinates, so that the practice is also identical (*s*).

County Courts.

231. Execution in county courts is controlled and regulated by statute and rules (*t*). County courts have neither jurisdiction to enforce execution against land itself (*u*), nor against shareholders of a corporation on a judgment or order against the corporation, nor have they power to make charging orders or to issue writs or warrants in the nature of writs of sequestration to compel obedience to their orders. The judgment or order must be removed into the High Court to obtain its enforcement by any of these methods (*x*).

Mayor's Court.

232. Execution in the Mayor's Court, London, is regulated by statute and by rules having statutory authority (*y*).

Court of Passage.

233. The enforcement of judgments and orders of the Liverpool Court of Passage is regulated by rules which have been adopted

(*p*) R. S. C., Ord. 42, r. 34. It is the practice of the King's Bench Division to regard such examinations as a luxury to be paid for by the plaintiff, and there is no appeal from the master beyond the judge without the judge's leave (*Adlington* v. *Conyngham*, [1898] 2 Q. B. 492, C. A.).

(*q*) *Jelks* v. *Hayward*, [1905] 2 K. B. 460; see pp. 21, 39, 63, *ante*. The duties and liabilities of bailiffs of county courts are statutory; see title COUNTY COURTS, Vol. VIII., pp. 425 *et seq.*

(*r*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55); Inferior Courts Act, 1844 (7 & 8 Vict. c. 19); see title SHERIFFS AND BAILIFFS.

(*s*) As to these courts, see title COURTS, Vol. IX., pp. 120 *et seq.*

(*t*) See title COUNTY COURTS, Vol. VIII., pp. 550 *et seq.*

(*u*) Notwithstanding that the county court has jurisdiction to appoint a receiver of rents and profits of a judgment debtor's equitable estate in land (*R.* v. *Selfe*, [1908] 2 K. B. 121).

(*x*) As to the power of removing judgments and orders from inferior courts for execution, and as to the power of enforcing the judgments of Scottish and Irish courts, see titles CONFLICT OF LAWS, Vol. VI., p. 291; JUDGMENTS AND ORDERS.

(*y*) See title MAYOR'S COURT, LONDON.

trom the Rules of the Supreme Court (*a*). It has no jurisdiction in equity, but can grant an injunction or a receiver and enforce obedience by attachment. There is jurisdiction to enforce judgments or orders by *fieri facias* or attachment, but no jurisdiction to enforce execution against land or to issue a *capias ad satisfaciendum* or any process analogous to a writ of sequestration, nor is there power to make charging orders against shares in companies, or to issue a notice in lieu of *distringas*, or to make a stop order, or to enforce judgments against a corporation by writ of sequestration either against the corporation or its members. There is no jurisdiction to issue execution against the share of a partner in his partnership firm (*b*). In all cases where it is sought to enforce a judgment or order against property by process unknown to this court the judgment or order should be removed into the High Court, or, if for recovery of not more than £20 (exclusive of torts), the judgment or order may be enforced by the county court within the jurisdiction of which the judgment debtor possesses goods (*c*). Debts of the judgment debtor may be attached by ordinary garnishee proceedings. The court can order discovery in aid of execution. Interpleader procedure is adopted. The officer to whom the execution of writs is committed is called the Serjeant at Mace (*d*).

Salford Hundred Court.

The Salford Hundred Court (*e*) has no equitable jurisdiction. The Rules of the Supreme Court have been adopted (*f*), but the limitations to the jurisdiction are precisely similar to those in the Liverpool Court of Passage. Warrants are committed to the bailiff of the court.

Bristol Tolzey Court.

The same is the case with the Tolzey Court of Bristol (*g*), in which warrants are committed to the Serjeant at Mace.

Process.

234. The practice in enforcing judgments in the numerous inferior courts is normally by execution against goods only, by warrants in the nature of *fieri facias* directed to the bailiff or other officer charged with their execution. In some of the courts the procedure under the Common Law Procedure Acts, 1852 (*h*), 1854 (*i*), and 1860 (*k*), has been adopted (*l*).

(*a*) Under the Judicature Act, 1884 (47 & 48 Vict. c. 61), and the Liverpool Court of Passage Act, 1893 (56 & 57 Vict. c. 37); see title COURTS, Vol. IX., pp. 173 *et seq.*

(*b*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 23.

(*c*) For the removal of judgments to county courts under the Borough and Local Courts of Record Act, 1872 (35 & 36 Vict. c. 86), s. 6, see title COUNTY COURTS, Vol. VIII., p. 567.

(*d*) See title COURTS, Vol. IX., pp. 173 *et seq.*; Peel, Jurisdiction and Practice of the Court of Passage of the City of Liverpool (1909).

(*e*) See title COURTS, Vol. IX., pp. 197 *et seq.*

(*f*) By order signed by MANISTY, J., and the judge of the court, dated 28th October, 1878; see *Turner* v. *Heyland* (1879), 4 C. P. D. 432.

(*g*) See title COURTS, Vol. IX., pp. 147 *et seq.* The orders and rules made in pursuance of the Judicature Acts in force on 20th June, 1878, as well as any orders and rules which might thereafter be made are applied to the Tolzey Court so far as they may be applicable thereto (order dated 20th June, 1878, Statutory Rules and Orders Revised, Vol. VI., Inferior Courts, p. 14).

(*h*) 15 & 16 Vict. c. 76.

(*i*) 17 & 18 Vict. c. 125.

(*k*) 23 & 24 Vict. c. 126.

(*l*) As, for instance, the Chester Court of Pentice and Portmote; see Statutory Rules and Orders Revised, Vol. VI., Inferior Courts, p. 20. For an account of each court to which reference is made, see title COURTS, Vol. IX.

EXECUTION CREDITOR.

See BANKRUPTCY AND INSOLVENCY; EXECUTION.

EXECUTION OF DOCUMENTS.

See DEEDS AND OTHER INSTRUMENTS; EVIDENCE; WILLS.

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Part I.—The Office of Executor or Administrator.

SECT. 1.—*Introduction.*

Devolution of property upon death.

235. Upon the death of a person all his property, whether personal or real (with one exception) devolves upon his personal representative (*a*), that is to say, his executor or administrator. The exception referred to is that of land of copyhold tenure or customary freehold in any case in which an admittance or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant (*b*). The exception only applies where the interest of the deceased was legal. An equitable estate in copyhold devolves upon the personal representative (*c*).

Meaning of terms "executor" and "administrator."

236. An executor is the person appointed by a will to administer the property of the testator, and to carry into effect the provisions of the will (*d*). An administrator is a person appointed by a court of competent jurisdiction to administer the property of a deceased person (*e*).

When appointment of administrator required.

237. The occasion for the appointment of an administrator arises on the death of a person intestate. A person may die intestate either in deed or in law. He dies intestate in deed if he has made no will, or has made a will which at his death has become entirely inoperative (*f*): he dies intestate in law where he has made a will without appointing an executor, or where the executor appointed by the will predeceases the testator, or is incapable of acting, or refuses to act, or dies without ever having obtained probate (*g*). Where an executor who has proved his testator's will afterwards dies intestate, the testator is intestate from the time of his executor's death.

SECT. 2.—*The Appointment of Executor.*

SUB-SECT. 1.—*By Nomination.*

Appointment of executor by nomination.

238. The ordinary method of appointing an executor is for a testator to nominate in his will a person by the express designation of executor. The appointment must be contained in the body of the will: a direction beneath the testator's signature cannot receive effect (*h*).

(*a*) The Act which provides for the devolution of realty upon a personal representative is the Land Transfer Act, 1897 (60 & 61 Vict. c. 65); see title DESCENT AND DISTRIBUTION, Vol. XI., pp. 4—6.

(*b*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1 (4); see, also, title COPYHOLDS, Vol. VIII., p. 89. As to vesting of intestate's effects in the President of the Probate, Divorce, and Admiralty Division until grant, see p. 146, *post*.

(*c*) *Re Somerville and Turner's Contract*, [1903] 2 Ch. 583. For the devolution of the legal estate in such lands, see title COPYHOLDS, Vol. VIII., pp. 86 *et seq.*

(*d*) See Shep. Touch. (ed. Preston) p. 400.

(*e*) The office of an administrator as opposed to that of an executor is said to be "dative," *i.e.*, it derives its origin from a court of competent jurisdiction. See Shep. Touch. (ed. Preston) p. 431.

(*f*) As in *Re Ford, Ford* v. *Ford*, [1902] 1 Ch. 218; affirmed, [1902] 2 Ch. 605, C. A.

(*g*) Shep. Touch. (ed. Preston) p. 462; *Graysbrook* v. *Fox* (1565), 1 Plowd. 275, 281.

(*h*) *In the Goods of Woods* (1868), L. R. 1 P. & D. 556; *In the Goods of Dallow* (1866), L. R. 1 P. & D. 189; and see title WILLS.

Identity of person nominated.

239. Should a question arise as to the identity of the person so appointed, the court will look at the surrounding circumstances at the date of the making of the will (*i*): it will not, however, accept evidence of the actual intention of the testator (*k*), except in a case where the description is equally applicable in all its parts to two or more persons (*l*). Where there is an individual exactly answering to the name and description, the court will not admit evidence to show that some other person was intended (*m*). There may be such an uncertainty with regard to the person intended as to render the appointment entirely void (*n*).

Nomination by another than testator.

240. A testator may authorise another to nominate an executor of his will, and effect will be given to such nomination (*o*). It would appear that the person authorised to nominate the executor may nominate himself (*p*).

SUB-SECT. 2.—*By Implication.*

Executor according to the tenor.

241. Even though a testator may fail to nominate a person in express terms to be his executor, yet if upon a reasonable construction of his will it appears that a particular person has been appointed to perform the essential duties of an executor, such an appointment is sufficient to constitute that person an executor (*q*). The person so appointed is called an executor according to the tenor: thus a person will be executor according to the tenor if, being made residuary legatee, he is appointed to discharge all lawful demands against the estate (*r*); or where the testator, having directed all his just debts and funeral and testamentary expenses to be duly paid and satisfied as soon as conveniently may be after his decease, gives all his personal estate to a person upon trust to convert into money, get in and receive the same, and to divide the money thereby produced equally amongst his children (*s*); or even where he is simply appointed to

(*i*) *Grant* v. *Grant* (1869), L. R. 2 P. & D. 8; *In the Goods of De Rosaz* (1877), 2 P. D. 66; *In the Goods of Twohill* (1879), 3 L. R. Ir. 21; *In the Goods of Brake* (1881), 6 P. D. 217; *In the Goods of O'Reilly* (1873), 43 L. J. (P. & M.) 5.

(*k*) *In the Goods of Twohill, supra*; *In the Goods of Chappell*, [1894] P. 98.

(*l*) *In the Goods of Ashton*, [1892] P. 83; *In the Estate of Hubbuck*, [1905] P. 129. See, too, *Charter* v. *Charter* (1874), L. R. 7 H. L. 364.

(*m*) *In the Goods of Peel* (1870), L. R. 2 P. & D. 46.

(*n*) *In the Goods of Baylis* (1862), 2 Sw. & Tr. 613; *In the Goods of Blackwell* (1877), 2 P. D. 72.

(*o*) *In the Goods of Cringan* (1828), 1 Hag. Ecc. 548; *In the Goods of Deichman* (1842), 3 Curt. 123. The power to authorise is apparently not affected by the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), see *Jackson and Gill* v. *Paulet* (1851), 2 Rob. Eccl. 344.

(*p*) *In the Goods of Ryder* (1861), 2 Sw. & Tr. 127.

(*q*) *In the Goods of Montgomery* (1846), 5 Notes of Cases, 99; *In the Goods of Collett* (1857), Dea. & Sw. 274; *In the Goods of Adamson* (1875), L. R. 3 P. & D. 253, in which case the essential duties of an executor were defined to consist of the collection of the deceased's assets, the payment of his funeral expenses and debts, and the discharge of the legacies; *In the Goods of R. Brown, deceased* (1910), 54 Sol. Jo. 478.

(*r*) *Grant* v. *Leslie* (1819), 3 Phillim. 116. Where a person is appointed universal legatee merely, without any directions, it is not the practice to grant probate to him as executor according to the tenor, but he is entitled to administration with the will annexed (*In the Goods of Oliphant* (1860), 1 Sw. & Tr. 525; *In the Goods of Pryse*, [1904] P. 301).

(*s*) *In the Goods of Baylis* (1865), L. R. 1 P. & D. 21. A direction to pay debts is not indispensable (*In the Goods of M'Kane* (1887), 21 L. R. Ir. 1).

SECT. 2. The Appointment of Executor.

pay all the just debts of the testator (*t*). If a testator employs the word "trustee" in a loose sense, the person appointed trustee is entitled to obtain probate of the will (*a*). But where it cannot be gathered from the will that the person named as trustee is required to pay the debts of the testator, and generally to administer his estate, he is not entitled to probate (*b*). A person may be an executor according to the tenor even in a case where other persons have been expressly appointed executors of the will (*c*).

SECT. 3.—*Executor for Particular or Limited Purposes.*

Difference between general and special executor.

242. A person who is appointed executor of the whole will, or of all the testator's property, or indefinitely, is called a general executor. But it is not necessary that a general executor should be appointed; the testator may limit the appointment, and the person who holds such a limited appointment is called a special executor (*d*). The directions containing the limitation must be clear (*e*).

Different executors for different properties.

243. A testator may make one person executor of all his cattle, corn, and movable goods, and another of his leases (*f*); he may make certain persons executors of his property abroad, and others of his property in England (*g*); he may appoint certain persons to be the general executors of his will, and others to be executors for his business or for property situated in a particular country (*h*). When a person is appointed executor for a place abroad he is not entitled to probate in this country (*i*). A person who is nominated executor only of the property not specified in the will, and is precluded from dealing with the property disposed of by the will, is not entitled to probate, but may obtain letters of administration with the will annexed (*k*).

Appointment of separate executor for real or trust estates.

It is conceived, however, that in the case of persons dying on or since 1st January, 1898, the appointment of one person as a separate

(*t*) *In the Goods of Cook*, [1902] P. 114. For other instances, see *In the Goods of Manly* (1862), 3 Sw. & Tr. 56; *In the Goods of Bell* (1878), 4 P. D. 85; *In the Goods of Wilkinson*, [1892] P. 227; *In the Goods of Way*, [1901] P. 345.

(*a*) *In the Goods of Leven and Melville (Earl)* (1889), 15 P. D. 22; *In the Goods of Russell, In the Goods of Laird*, [1892] P. 380; *In the Goods of Kirby*, [1902] P. 188; *In the Goods of Shaw* (1895), 73 L. T. 192; *In the Goods of Nussey* (1898), 78 L. T. 169.

(*b*) *Boddicott and Hamilton* v. *Dalzeel* (1756), 2 Lee, 294; *In the Goods of Jones (James)* (1861), 2 Sw. & Tr. 155; *In the Goods of Fraser* (1870), L. R. 2 P. & D. 183; *In the Goods of Punchard* (1872), L. R. 2 P. & D. 369; *In the Goods of Lowry* (1874), L. R. 3 P. & D. 157; *In the Goods of Toomy* (1864), 3 Sw. & Tr. 562; *In the Goods of Love* (1881), 7 L. R. Ir. 178; *In the Estate of Mackenzie*, [1909] P. 305.

(*c*) *Grant* v. *Leslie* (1819), 3 Phillim. 116; *In the Goods of Brown* (1877), 2 P. D. 110; *In the Goods of Lush* (1887), 13 P. D. 20; *In the Goods of Wright* (1908), 25 T. L. R. 15.

(*d*) Godolphin, Orphan's Legacy, Part II., c. 2, s. 8 (1).

(*e*) *Lynch* v. *Bellew and Fallon* (1820), 3 Phillim. 424.

(*f*) Went. Off. Ex., 14th ed., p. 29; *Rose* v. *Bartlett* (1633), Cro. Car. 292.

(*g*) *In the Goods of Harris* (1870), L. R. 2 P. & D. 83.

(*h*) *Re Parker's Trusts*, [1894] 1 Ch. 707; *Re Cohen's Executors and London County Council*, [1902] 1 Ch. 187.

(*i*) *Velho* v. *Leite* (1864), 3 Sw. & Tr. 456.

(*k*) *In the Goods of Wakeham* (1872), L. R. 2 P. & D. 395.

executor of a testator's real estate would be a bad appointment (*l*). An appointment of a separate executor of a testator's trust or mortgage estates would also be invalid in the case of a person dying after 1881 (*m*).

SECT. 3. Executor for Particular or Limited Purposes.

244. A testator may appoint his widow to be his executrix during her widowhood (*n*), or his son to be his executor upon attaining his majority (*o*). He may make the appointment conditional upon the happening of a certain event (*p*), and he may upon the happening of a certain event substitute one executor for another (*q*).

Conditional and substituted appointments.

SECT. 4.—*Who may be appointed Executor.*

245. No restriction whatever exists upon the choice of an executor (*r*). If, however, the person appointed be an infant or a minor, or of unsound mind, probate will not be granted to him during the period of disability, but, if he be sole executor, letters of administration with the will annexed will be granted to a guardian or other person on his behalf (*s*); if he be one of several executors, power will be reserved to him to prove after the removal of the disability.

No restriction upon choice.

246. If the King be appointed executor he nominates trustees to execute for him, and auditors to whom the trustees are to account (*t*).

The Sovereign.

If a corporation aggregate be appointed, being itself incapable of taking the executor's oath, it appoints a person styled a syndic,

A corporation aggregate.

(*l*) The Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1, itself provides for the devolution of real estate on death; by the Act it is, notwithstanding any testamentary disposition, to devolve to and become vested in the personal representatives or representative from time to time, and the personal representative is defined by the Act (s. 24) to mean an executor or administrator. Though the Act is expressed to be an Act to establish a real representative (see preamble), it nowhere authorises the appointment of a real representative, and, apart from the Act, there is no such office known to the law as that of a real representative.

(*m*) *Re Parker's Trusts*, [1894] 1 Ch. 707; see the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 30.

(*n*) Went. Off. Ex., 14th ed., p. 29.

(*o*) *Ibid.*, pp. 22, 23.

(*p*) *In the Goods of Langford* (1867), L. R. 1 P. & D. 458.

(*q*) *In the Goods of Lighton (Sir J.)* (1828), 1 Hag. Ecc. 235; *In the Goods of Johnson* (1858), 1 Sw. & Tr. 17; *In the Goods of Betts* (1861), 30 L. J. (P. M. & A.) 167; *In the Goods of Lane* (1864), 33 L. J. (P. M. & A.) 185; *In the Goods of Foster* (1871), L. R. 2 P. & D. 304.

(*r*) The effect of the Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 2, is to enable an alien to be an executor; see title ALIENS, Vol. I., p. 309: the disability of coverture was removed by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 1 (2), 24. Outlawry or felony were never a bar to the office (Went. Off. Ex., 14th ed., p. 36); *Smethurst* v. *Tomlin and Bankes* (1861), 2 Sw. & Tr. 143, 147.

(*s*) See Administration of Estates Act, 1798 (38 Geo. 3, c. 87), s. 6. The grant will in the first case be made to the committee of a lunatic executor; if he has no committee, then to the residuary legatee or devisee for his use and benefit; if there be no residuary legatee or devisee, a like grant will be made to the lunatic's husband, wife, next of kin, or heir-at-law (if there is real estate); see p. 200, *post*.

(*t*) Went. Off. Ex., 14th ed., p. 39; see also title CONSTITUTIONAL LAW, Vol. VI., p. 495.

SECT. 4. Who may be appointed Executor.

or nominee, to receive administration with the will annexed and the syndic is sworn like any other administrator (*u*). Where the corporation aggregate is appointed together with one or more individual executors, administration will not be granted to the syndic unless all those individually appointed renounce probate (*v*).

The Public Trustee.

By a modern statute (*x*), and the rules made thereunder (*a*), the Public Trustee has been established as a corporation sole with power to accept probates or letters of administration of any kind.

A partnership firm.

247. The appointment as executors of an ordinary partnership firm is considered to be an appointment not of the firm collectively, but of the individuals composing the firm; accordingly the dissolution of the firm does not affect the appointment (*b*). The appointment, moreover, only extends to the members of the firm at the date of the will, unless a contrary intention is expressed therein.

Persons of bad character or in poor circumstances.

248. The courts will not accept the disabilities recognised by the canon law on moral or religious grounds (*c*): nor will probate be refused on the ground of the bankruptcy or insolvency of the executor (*d*). The courts of equity have, however, in the latter case assumed the jurisdiction of appointing a receiver (*e*). The jurisdiction is not exercised where it is shown that the testator himself was at the time of making his will aware of the financial position of the executor (*f*): where there is a solvent executor willing to act, the court will restrain the bankrupt executor from acting, but will refrain from appointing a receiver (*g*).

SECT. 5.—*Devolution of the Representative Office.*

SUB-SECT. 1.—*Upon Death.*

Devolution of office.

249. Upon the death of one of several representatives the office, with its incidents, duties, and powers, and the interest in all the property vested in the representatives by virtue of their office, devolves upon the survivors or survivor (*h*).

(*u*) Went. Off. Ex., 14th ed., p. 39; *In the Goods of Darke* (1859), 1 Sw. & Tr. 517; *In the Goods of Hunt*, [1896] P. 288, where administration with the will annexed was granted to the general manager of a limited company appointed by deed poll as their nominee to obtain letters of administration; see also title CORPORATIONS, Vol. VIII., p. 357.

(*v*) *In the Goods of Martin* (1904), 90 L. T. 264. As to renunciation, see p. 143, *post*.

(*x*) Public Trustee Act, 1906 (6 Edw. 7, c. 55), ss. 1, 6 (1); and see, generally, title TRUSTS AND TRUSTEES.

(*a*) Public Trustee Rules, 1907, r. 7 (b).

(*b*) *In the Goods of Fernie* (1849), 6 Notes of Cases, 657.

(*c*) *R.* v. *Raines* (1698), 1 Ld. Raym. 361.

(*d*) *Hills* v. *Mills* (1691), 1 Salk. 36.

(*e*) *R.* v. *Simpson* (1764), 1 Wm. Bl. 455; *Utterson* v. *Mair* (1793), 2 Ves. 95; *Gladdon* v. *Stoneman* (1808), 1 Madd. 143, n.; cited in *Howard* v. *Papera* (1815), 1 Madd. 142; *Re Hopkins, Dowd* v. *Hawtin* (1881), 19 Ch. D. 61, C. A.

(*f*) *Stainton* v. *Carron Co.* (1853), 18 Beav. 146, 161. In *Langley* v. *Hawk* (1826), 5 Madd. 46, the subsequent knowledge of the testator was not held to be a ground for refusing the appointment.

(*g*) *Bowen* v. *Phillips*, [1897] 1 Ch. 174.

(*h*) *Flanders* v. *Clarke* (1747), 3 Atk. 509; *Eyre* v. *Shaftsbury* (*Countess*) (1722), 2 P. Wms. 102, 121.

SECT. 5. Devolution of the Representative Office.

250. In the case of the death of a sole executor, or of the last survivor of several executors (*i*), the office devolves upon the executor of the sole or last surviving executor (*k*). If, however, the representation is to be transmitted, the original executor must either by himself (*l*), or by his attorney (*m*), have obtained representation to his testator's estate in England (*n*).

Full executor of limited executor.

251. A full executor of a limited executor sufficiently represents the estate of the original testator (*o*), but not a limited executor of a full executor (*p*). Thus, where under the old practice of the Probate Court a limited grant was made to the estate of a married woman, the chain of representation was broken (*q*). The modern practice is, however, to make a general grant (*r*).

Executor of executor.

Administrator of executor.

252. The office does not devolve upon the administrator of an executor. Upon the death of an administrator the office does not devolve; a fresh grant of administration to the property of the original testator remaining unadministered must be obtained (*a*).

SUB-SECT. 2.—*By Assignment.*

Under the Public Trustee Act.

253. Neither the office of executor nor that of administrator is assignable at common law (*b*), but under statute (*c*) both an executor and an administrator may, with the consent of the court, after such notice to the persons beneficially interested as the court may direct, transfer the estate to the Public Trustee for administration either solely or jointly with the continuing executors or administrators, if any.

Under Judicial Trustees Act. 1896.

254. The court has also power, upon the application of a personal representative or of a beneficiary, to appoint a person called a judicial trustee to act in the administration of a deceased person's property, and, if sufficient cause is shown, to displace the personal representative (*d*).

(*i*) When a surviving executor to whom power to prove has been reserved is, upon the death of the acting executor, cited to take probate, and does not appear, the office devolves upon the executor of the acting executor without further grant (*In the Goods of Reid*, [1896] P. 129, following *In the Goods of Noddings* (1860), 2 Sw. & Tr. 15, as corrected in the Errata and Corrigenda; compare also Court of Probate Act, 1858 (21 & 22 Vict. c. 95), s. 16).

(*k*) Went. Off. Ex., 14th ed., pp. 462, 463.

(*l*) *Wankford* v. *Wankford* (1703), 1 Salk. 299, 308; *Twyford* v. *Trail* (1834), 7 Sim. 92.

(*m*) *In the Goods of Bayard* (1849), 1 Rob. Eccl. 768. It is sufficient if the attorney obtains letters of administration with the will annexed for the use of the executor (*In the Goods of Murguia* (*Donna Maria Vea*) (1884), 9 P. D. 236).

(*n*) *In the Goods of Gaynor* (1869), L. R. 1 P. & D. 723.

(*o*) *In the Goods of Beer* (1851), 2 Rob. Eccl. 349. As to a limited executor, see p. 138, *ante*.

(*p*) *In the Goods of Bayne* (1858), 1 Sw. & Tr. 132; *In the Goods of Bridger* (1878), 4 P. D. 77.

(*q*) *In the Goods of Martin* (1862), 3 Sw. & Tr. 1; *In the Goods of Hughes* (1860), 4 Sw. & Tr. 209; *In the Goods of Richards* (1866), L. R. 1 P. & D. 156; *In the Goods of Bridger*, *supra*.

(*r*) See p. 170, *post*.

(*a*) See p. 195, *post*.

(*b*) Shep. Touch. (ed. Preston) 465; 2 Bl. Com., 506.

(*c*) Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 6 (2).

(*d*) Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 1 (1), (2); *Re Ratcliff*, [1898] 2 Ch. 352. For rules under the Act, see W. N. (1897), Part II., p. 267. For vesting and other orders consequential upon the appointment of a judicial trustee, see title TRUSTS AND TRUSTEES.

SECT. 6. Acceptance and Refusal of the Office.

SECT. 6.—*Acceptance and Refusal of the Office.*

SUB-SECT. 1.—*Acceptance.*

What acts constitute an acceptance of office.

255. The most obvious method of accepting the office is for the person appointed executor to obtain a grant of probate (*e*). But the executor may, without any application for probate, do such acts with reference to the testator's estate as constitute an acceptance of the office. Acts which show an intention on the part of the executor to take upon himself the office (*f*), or which would, in the case of a person not appointed executor, render such person liable as an executor *de son tort* (*g*), constitute an acceptance. The release of a debt of the testator (*h*), the application, even though unsuccessful, for the payment of money owing to the testator (*i*), a statement, in answer to an inquiry by a creditor, that the will has been proved, and that the writer is one of the executors (*k*), would amount to an acceptance.

What acts do not amount to an acceptance.

256. The mere performance of acts of charity or of necessity (*l*) do not constitute an acceptance; and the executor may examine into the testator's books, with a view to determining whether he shall accept the office or not, without rendering himself liable to take probate (*m*). An application for probate, even followed by taking the oath of office, does not prevent the executor from renouncing before the grant has actually passed the seal (*n*).

A person named as executor may act as the agent for a co-executor who has proved the will without rendering himself liable to account as an executor (*o*), even though he has not formally renounced (*p*).

An executor who has acted cannot renounce.

257. An executor who has once so acted as to show an intention of accepting the office cannot afterwards renounce (*q*): he may be

(*e*) A person cannot be compelled to accept the office, even though he has agreed to accept it in the lifetime of the testator (*Doyle* v. *Blake* (1804), 2 Sch. & Lef. 231, 239).

(*f*) Bac. Abr., tit. Executor, E, 10.

(*g*) *Long and Feaver* v. *Symes and Hannam* (1832), 3 Hag. Ecc. 771. As to an executor *de son tort*, see p. 147, *post*.

(*h*) Went. Off. Ex., 14th ed., p. 94; *Pytt* v. *Fendall* (1754), 1 Lee, 553.

(*i*) *Re Stevens, Cooke* v. *Stevens*, [1897] 1 Ch. 422.

(*k*) *Vickers* v. *Bell* (1864), 10 Jur. (N. S.) 376.

(*l*) Shep. Touch. (ed. Preston) p. 466; *Long and Feaver* v. *Symes and Hannam*, *supra*. See further, as to what are acts of charity or necessity, p. 148, *post*.

(*m*) Godolphin, Orphan's Legacy, Part II., c. 8, s. 6, 3rd ed., 102. Taking possession of the testator's books of account may be sufficient to show an acceptance (*Clark* v. *Phillips, Bayles* v. *Phillips* (1854), 2 W. R. 331).

(*n*) *Jackson and Wallington* v. *Whitehead* (1821), 3 Phillim. 577; *M'Donnell* v. *Prendergast* (1830), 3 Hag. Ecc. 212; *Mohamidu Mohideen Hadjiar* v. *Pitchey*, [1894] A. C. 437, P. C.

(*o*) *Orr* v. *Newton* (1791), 2 Cox, Eq. Cas. 274; *Dove* v. *Everard* (1830), 1 Russ. & M. 231; *Rayner* v. *Green* (1839), 2 Curt. 248.

(*p*) *Stacey* v. *Elph* (1833), 1 My. & K. 195.

(*q*) *Rogers* v. *Frank* (1827), 1 Y. & J. 409; *Long and Feaver* v. *Symes and Hannam*, *supra*; *In the Goods of Badenach* (1864), 3 Sw. & Tr. 465; and see *In the Goods of Veiga* (1862), 3 Sw. & Tr. 13, where the executor had taken a grant. In *In the Goods of Fitzpatrick* (1892), 29 L. R. Ir. 328, it is said that the court may, though perhaps it ought not to, accept the executor's refusal, notwithstanding he has administered.

cited to take probate (*r*) and be peremptorily ordered to do so (*s*). Nor can he discharge himself from his liability to account as executor by renouncing and paying his receipts to the executors who have proved (*t*).

Effect of acceptance.

258. An executor cannot accept in part and refuse in part: he must accept or refuse the office *in toto* (*a*).

An executor of an executor, who has accepted the executorship of the latter testator, cannot renounce the executorship of the former (*b*).

The acceptance of the executorship involves the acceptance of the trusts which the testator himself may have imposed upon his executors (*c*), or which in a court of equity are considered to arise from the office (*d*).

SUB-SECT. 2.—*Refusal.*

By renunciation.

259. A person appointed executor who does not wish to act may renounce the office: he may renounce either personally or by power of attorney (*e*), and his renunciation need not be under seal (*f*). The renunciation is not final until it is filed in the proper court (*g*), nor does it become effective until filed (*h*). The executor may renounce as soon as his testator is dead, and his renunciation can be filed, provided it is accompanied by the original will (*i*).

The effect of renunciation.

260. Where a person renounces probate his rights in respect of the executorship wholly cease, and the representation to the testator, and the administration of his effects, devolve and may be committed in like manner as if such person had not been appointed executor (*k*). A person who renounces probate as executor is not in practice allowed to take representation to the testator in another character (*l*), except by permission of the court (*m*).

(*r*) *In the Goods of Lister* (1894), 70 L. T. 812; *In the Goods of Coates* (1898), 78 L. T. 820. Attachment will not issue against an executor for disobeying such a citation, unless there is indorsed upon the citation a memorandum that he is liable to process of execution for the purpose of compelling him to obey the same (R. S. C., Ord. 41, r. 5; *In the Goods of Bristow* (1891), 66 L. T. 60).

(*s*) *Mordaunt* v. *Clarke* (1868), L. R. 1 P. & D. 592.

(*t*) *Read* v. *Truelove* (1762), Amb. 417.

(*a*) Shep. Touch. (ed. Preston) p. 466.

(*b*) *In the Goods of Perry* (1840), 2 Curt. 655; *Brooke* v. *Haymes* (1868), L. R. 6 Eq. 25; *In the Goods of Delacour* (1874), 9 I. R. Eq. 86.

(*c*) *Mucklow* v. *Fuller* (1821), Jac. 198; *Ward* v. *Butler* (1824), 2 Mol. 533; *Stiles* v. *Guy* (1832), 4 Y. & C. (EX.) 571.

(*d*) *Re Marsden, Bowden* v. *Layland, Gibbs* v. *Layland* (1884), 26 Ch. D. 783.

(*e*) Toller, Law of Executors, 7th ed., p. 42; *In the Goods of Rosser* (1864), 3 Sw. & Tr. 490.

(*f*) *In the Goods of Boyle* (1864), 3 Sw. & Tr. 426.

(*g*) *In the Goods of Morant* (1874), L. R. 3 P. & D. 151. The instrument of renunciation must be filed in the principal registry, or in one of the district registries.

(*h*) *In the Goods of Morant, supra.*

(*i*) *In the Goods of Fenton* (1825), 3 Add. 35.

(*k*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 79.

(*l*) Probate Rules (Non-Contentious), 1862, r. 50.

(*m*) *In the Goods of Gill* (1873), L. R. 3 P. & D. 113; *In the Goods of Wheelwright* (1878), 3 P. D. 71; *In the Goods of Rayner* (1908), 52 Sol. Jo. 226.

SECT. 6: **Acceptance and Refusal of the Office.**

A person entitled to a grant of administration or administration with the will annexed may also renounce, but in such cases the renunciation does not bind the representatives of the renouncing party.

An executor to whom power to prove has been reserved may, by leave of the registrar, renounce after probate has been granted to a co-executor.

Withdrawal of renunciation.

261. The court may, in a proper case, allow one of several executors to withdraw his renunciation for the purpose of taking a grant (*n*): but when all the executors have renounced and letters of administration have been granted, a renunciation cannot subsequently be withdrawn (*o*), nor will the withdrawal be allowed merely on the ground that the executor has changed his mind (*p*). A renunciation cannot be withdrawn without the leave of the court (*q*), and the renouncing executor must show that his retractation is for the benefit of the estate or of those interested under the will (*r*).

Refusal by non-appearance.

262. The executor may also, without an express renunciation, refrain from appearing to a citation to take probate: in such a case his rights in respect of the executorship wholly cease, and the representation devolves as in the case of a renunciation (*s*).

SECT. 7.—*What may be done by an Executor before Probate.*

Source of executor's title.

263. The executor derives his title under the will (*a*), and his testator's property vests in him as from the date of the death (*b*) without any interval of time (*c*). The probate itself is a mere authentication of his title (*d*).

Validity of his acts.

264. An executor may before probate generally do all things which pertain to the executorial office (*e*). He may pay or release debts (*f*), get in and receive the testator's estate (*g*), assent to a legacy (*h*), and generally intermeddle with the testator's goods (*i*).

(*n*) *In the Goods of Stiles*, [1898] P. 12; see, too, *In the Goods of Badenach* (1864), 3 Sw. & Tr. 465, and *In the Goods of Whitham* (1866), L. R. 1 P. & D. 303; see, also, *In the Goods of Thacker*, [1900] P. 15, for leave to retract a renunciation to letters of administration.
(*o*) *In the Goods of Stiles, supra*, at p. 14.
(*p*) *In the Goods of Gill* (1873), L. R. 3 P. & D. 113.
(*q*) *Melville* v. *Ancketill* (1909), 25 T. L. R. 655, C. A.
(*r*) See *In the Goods of Gill, supra*.
(*s*) Court of Probate Act, 1858 (21 & 22 Vict. c. 95), s. 16.
(*a*) *Comber's Case* (1721), 1 P. Wms. 766.
(*b*) *Woolley* v. *Clark* (1822), 5 B. & Ald. 744.
(*c*) *Whitehead* v. *Taylor* (1839), 10 Ad. & El. 210.
(*d*) *Smith* v. *Milles* (1786), 1 Term Rep. 475, 480. As to the effect of a grant of probate as evidence, see title EVIDENCE, Vol. XIII., p. 553.
(*e*) Went. Off. Ex., 14th ed., p. 81.
(*f*) *Ibid.*
(*g*) *Wills* v. *Rich* (1742), 2 Atk. 285.
(*h*) Went. Off. Ex., 14th ed.; p. 82; *Wankford* v. *Wankford* (1703), 1 Salk. 299, 301; *Johnson* v. *Warwick* (1856), 17 C. B. 516.
(*i*) *Wankford* v. *Wankford, supra*.

SECT. 7.
What may be done by an Executor before Probate.

He may distrain for rent (*k*), demise (*l*), grant a next presentation (*m*), or release an action (*n*). He may make a conveyance or assignment of personalty (*o*) or of realty (*p*). But though he can, before probate, give a valid receipt for money payable upon an assignment, he cannot compel a purchaser to complete until after probate has been obtained (*q*).

In case of death before grant.

265. The acts of an executor, who dies without ever obtaining probate, hold good, provided the will is ultimately proved (*r*).

Power to maintain proceedings.

266. As an executor derives his title from the will and not from the grant of probate, he may commence an action as executor before probate, but he cannot proceed beyond the stage at which it becomes necessary to prove his title (*s*), as the only evidence of his title is the grant (*t*). He may also as executor of a deceased creditor present a petition in bankruptcy (*a*), or a petition to wind up a limited company (*b*) before probate.

Stay of action until production of probate.

267. Where a debtor does not dispute the debt, but requires production of probate before making payment to the executors, the court can and will stay proceedings taken by the executors until production of probate (*c*).

Action founded on possession of executor.

268. An executor can also in his personal capacity maintain an action in respect of property of which he has been in actual possession (*d*); but when the possession is in dispute, he must prove his title as executor (*e*).

Liability to be sued.

269. If an executor elect to act he may be sued before probate, and cannot afterwards renounce (*f*). But the court will not allow an action to be brought against one appointed executor, who has never meant to act, before he has had an opportunity of

(*k*) *Whitehead* v. *Taylor* (1839), 10 Ad. & El. 210.
(*l*) *Roe* d. *Bendall* v. *Summerset* (1770), 2 Wm. Bl. 692.
(*m*) *Smithley* v. *Chomeley* (1556), 2 Dyer, 135 a.
(*n*) Went. Off. Ex., 14th ed., p. 81.
(*o*) *Brazier* v. *Hudson* (1836), 8 Sim. 67.
(*p*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 2 (2).
(*q*) *Newton* v. *Metropolitan Rail. Co.* (1861), 1 Drew. & Sm. 583; see, also, *Re Stevens, Cooke* v. *Stevens*, [1897] 1 Ch. 422.
(*r*) Went. Off. Ex., 14th ed., p. 82; *Brazier* v. *Hudson, supra.*
(*s*) *Wankford* v. *Wankford* (1703), 1 Salk. 299, 303; *Wills* v. *Rich* (1742), 2 Atk. 285; *Thompson* v. *Reynolds* (1827), 3 C. & P. 123. The stage at which the executor has to prove his title is as a rule the hearing (*Newton* v. *Metropolitan Rail. Co., supra; Re Masonic and General Life Assurance Co.* (1885), 32 Ch. D. 373.
(*t*) *R.* v. *Netherseal* (*Inhabitants*) (1791), 4 Term Rep. 258, 260; *Pinney* v. *Hunt* (1877), 6 Ch. D. 98.
(*a*) *Rogers* v. *James* (1816), 7 Taunt. 147; *Re Drakeley, Ex parte Paddly* (1818), 3 Madd. 241.
(*b*) *Re Masonic and General Life Assurance Co., supra.*
(*c*) *Tarn* v. *Commercial Bank of Sydney* (1884), 12 Q. B. D. 294, following *Webb* v. *Adkins* (1854), 14 C. B. 401.
(*d*) *Oughton* v. *Seppings* (1830), 1 B. & Ad. 241.
(*e*) *Pinney* v. *Pinney* (1828), 8 B. & C. 335.
(*f*) *Webster* v. *Webster* (1804), 10 Ves. 93; *Blewitt* v. *Blewitt* (1832), You. 541; *Vickers* v. *Bell* (1864), 4 De G. J. & Sm. 274, C. A.; *Re Lovett, Ambler* v. *Lindsay* (1876), 3 Ch. D. 198.

SECT. 7. What may be done by an Executor before Probate.

renouncing (*g*); nor will it make an order for general administration in the absence of a duly constituted legal personal representative (*h*).

SECT. 8.—*What may be done by an Administrator before Grant.*

SUB-SECT. 1.—*The Source of an Administrator's Title.*

The source of an administrator's title.

270. The administrator derives his title entirely from the grant of letters of administration, and the property of the deceased does not vest in him until such grant (*i*). Until the grant the personal estate and effects of the intestate are vested in the President of the Probate, Divorce, and Admiralty Division (*k*): the real estate is vested in the heir-at-law (*l*).

SUB-SECT. 2.—*The Doctrine of Relation Back.*

Doctrine of relation back.

271. In order to prevent injury from being done to a deceased person's estate without remedy (*m*), the courts have adopted the doctrine that upon the grant being made the title of the administrator relates back to the time of death. This doctrine has been consistently applied in aid of an administrator seeking to recover against a person who has dealt wrongfully with the deceased's chattels or chattels real (*n*): it is also applicable against a person dealing wrongfully with the deceased's real estate (*o*).

Application.

To validate dispositions for benefit of estate.

272. The doctrine is also applied to render valid dispositions of the deceased's property made before the grant, when it is shown that such dispositions are for the benefit of the estate (*p*), or have been made in due course of administration (*q*). The disposition need not have been made by the person who ultimately obtains the grant, if it is ratified by the administrator on obtaining the grant (*r*). The doctrine does not apparently justify a distress made for rent before

(*g*) *Douglas* v. *Forrest* (1828), 4 Bing. 686, 704.

(*h*) *Penny* v. *Watts* (1846), 2 Ph. 149; *Creasor* v. *Robinson* (1851), 14 Beav. 589; *Cary* v. *Hills* (1872), L. R. 15 Eq. 79; *Rowsell* v. *Morris* (1873), L. R. 17 Eq. 20, disapproving *Rayner* v. *Koehler* (1872), L. R. 14 Eq. 262, and *Coote* v. *Whittington* (1873), L. R. 16 Eq. 534; see, also, *Dowdeswell* v. *Dowdeswell* (1878), 9 Ch. D. 294, C. A.

(*i*) *Comber's Case* (1721), 1 P. Wms. 766; *Woolley* v. *Clark* (1822), 5 B. & Ald. 744.

(*k*) By the Court of Probate Act, 1858 (21 & 22 Vict. c. 95), s. 19, the personal estate and effects of a person dying intestate became vested in the judge of the Court of Probate for the time being. By the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34, all causes and matters pending in the Court of Probate at the date of the Act were assigned to the Probate, Divorce, and Admiralty Division of the High Court of Justice; see, also, title COURTS, Vol. IX., p. 62.

(*l*) *John* v. *John*, [1898] 2 Ch. 573, C. A.

(*m*) *Long* v. *Hebb* (1652), Sty. 341.

(*n*) *R.* v. *Horsley* (*Inhabitants*) (1807), 8 East, 405; *Tharpe* v. *Stallwood* (1843), 5 Man. & G. 760; *Foster* v. *Bates* (1843), 12 M. & W. 226; *Barnett* v. *Guildford* (*Earl*) (1855), 11 Exch. 19.

(*o*) *In the Goods of Pryse*, [1904] P. 301, C. A.

(*p*) *Morgan* v. *Thomas* (1853), 8 Exch. 302, *per* PARKE, B., at p. 307.

(*q*) *Whitehall* v. *Squire* (1690), 1 Salk. 295; *Ellis* v. *Ellis*, [1905] 1 Ch. 613; see, also, *Hill* v. *Curtis* (1865), L. R. 1 Eq. 90, *per* WOOD, V.-C., at p. 100.

(*r*) *Foster* v. *Bates*, *supra*.

grant (*s*), although in ejectment it allowed a demise to be laid at a period anterior to the grant (*t*).

SECT. 8. What may be done by an Administrator before Grant.

273. Though the administrator may after grant enforce a contract entered into before grant (*a*), he is not estopped in an action brought after grant from setting up his title of personal representative to defeat his own acts before grant (*b*).

Estoppel.

274. A promise to pay a debt made to a person assuming to act as administrator, who subsequently obtains letters of administration, will keep the debt alive in favour of the estate (*c*).

Effect of promise made to administrator before grant.

275. Where the claim is founded upon actual possession, an administrator has, no doubt, before grant the same power as an executor to bring actions in his personal capacity. Where he is desirous of bringing an action, before grant, in a representative capacity, in the Chancery Division, he may do so, but he must be in a position to produce a grant at the hearing. At common law he could not sue before grant, and it has been held that this rule still prevails in the King's Bench Division (*d*).

Actions by an administrator before grant.

SECT. 9.—*The Executor de son tort.*

SUB-SECT. 1.—*What Acts make a Man Executor de son tort.*

276. An executor *de son tort* is one who takes upon himself the office of an executor, or intermeddles with the goods of a deceased person, without having been appointed an executor, or without having obtained a grant of administration from a competent court (*e*). The term is equally applicable in the case of an intestacy as in the case of testacy, there being no such term known to the law as an administrator *de son tort* (*f*). The term is not properly applicable to an executor who acts before probate (*g*).

Definition of executor *de son tort*.

277. The slightest circumstance may make a person executor *de son tort* if he intermeddles with the assets in such a way as to denote an assumption of the authority or an intention to exercise

Slight acts of interference sufficient.

(*s*) *Keane* v. *Dee* (1821), cited in *Patten* v. *Patten* (1833) Alc. & N. 493, 496. As to distress before grant, see p. 145, *ante*.

(*t*) *Patten* v. *Patten*, *supra*.

(*a*) *Foster* v. *Bates* (1843), 12 M. & W. 226.

(*b*) *Doe* d. *Hornby* v. *Glenn* (1834), 1 Ad. & El. 49; *Metters* v. *Brown* (1863), 1 H. & C. 686.

(*c*) *Bodger* v. *Arch* (1854), 10 Exch. 333; *Clark* v. *Hooper* (1834), 10 Bing. 480, as explained in *Stamford, Spalding and Boston Banking Co.* v. *Smith*, [1892] 1 Q. B. 765, 769, C. A. See also title LIMITATION OF ACTIONS.

(*d*) *Tattershall* v. *Ashworth* (1903), cited in Yearly Practice of the Supreme Court, 1911, p. 9. An administrator could not commence a suit at law before grant (*Martin* v. *Fuller* (1796), Comb. 371; *Wankford* v. *Wankford* (1703), 1 Salk. 299, *per* POWYS, J., at p. 301). He could, however, file a bill in Chancery, and it was sufficient if he produced the grant at the hearing (*Fell* v. *Lutwidge* (1740), Barn. (CH.) 319; *Moses* v. *Levi* (1839), 3 Y. & C. (EX.) 359, 366; *Davies* v. *Coleman* (1839), 3 Jur. 948; *Horner* v. *Horner* (1853), 23 L. J. (CH.) 10).

(*e*) For a definition, see Went. Off. Ex., 14th ed., p. 320.

(*f*) Godolphin, Orphan's Legacy, Part II., c. 8, s. 2.

(*g*) *Rogers* v. *Frank* (1827), 1 Y. & J. 409, 414.

SECT. 9.

The Executor de son tort.

the functions of an executor (*h*). Demanding payment of debts due to the deceased, paying the deceased's debts (*i*), carrying on his business (*k*), disposing of his goods (*l*), may make a person executor *de son tort;* but setting up a colourable title to the deceased's goods is not enough (*m*). A person who enters upon a deceased person's leasehold property, pays the ground rent, and applies the rack-rent to his own purposes, renders himself liable to the landlord upon the covenants of the lease as executor *de son tort* of the lessee (*n*): but not a person who takes over leasehold property from an executor *de son tort* (*o*).

In the case of grant procured by fraud.

278. A person who fraudulently procures administration to be granted to a stranger of mean estate, and thereby obtains possession of assets of the deceased person without paying their full value, renders himself liable to be charged as executor *de son tort;* but he is to be allowed all just debts owing to him by the deceased, and all payments made by him which a lawful representative might have made (*p*). It has been said that a person who has obtained goods by a deed of gift, fraudulent as against the donor's creditors, is, after the donor's death, liable to his creditors as executor *de son tort* in respect of the goods while they remain in his hands (*q*).

Acts of charity or necessity.

279. A person may, if necessity arises, give directions for the funeral (*r*), and may appropriate a reasonable sum for that purpose out of the money, of the deceased (*s*); may place the goods of the deceased in a place of safety (*t*); may lock them up for preservation and make an inventory of them (*a*); may order necessaries for the household, provide for the deceased's horses and cattle, and pay the physician's fees (*b*). By so doing, he will not make himself liable as an executor *de son tort.*

Receipt of property from executor *de son tort.*

280. A person who receives payment from the executor *de son tort* of a debt due from the deceased (*c*), or who takes over property

(*h*) *Peters* v. *Leeder* (1878), 47 L. J. (Q. B.) 573.

(*i*) Godolphin, Orphan's Legacy, Part II., c. 8, s. 1. In *Serle* v. *Waterworth* (1838), 4 M. & W. 9, the giving by the widow of the deceased of a promissory note for a debt which was owing from the deceased was held not to constitute the widow executrix *de son tort.*

(*k*) *Hooper* v. *Summersett* (1810), Wight. 16.

(*l*) *Read's Case* (1604), 5 Co. Rep. 33 b; *Nulty* v. *Fagan* (1888), 22 L. R. Ir. 604. See also title AUCTION AND AUCTIONEERS, Vol. I., p. 521.

(*m*) *Femings* v. *Jarrat* (1795), 1 Esp. 335; Godolphin, Orphan's Legacy, Part II., c. 8, s. 3.

(*n*) *Williams* v. *Heales* (1874), L. R. 9 C. P. 177.

(*o*) *Paull* v. *Simpson* (1846), 9 Q. B. 365.

(*p*) Stat. (1601) 43 Eliz. c. 8.

(*q*) *Hawes* v. *Loader* (1611), Yelv. 196; see, too, *Nunn* v. *Wilsmore* (1800), 8 Term Rep. 521; *Seally* v. *Powis* (1835), 1 Har. & W. 2.

(*r*) *Harrison* v. *Rowley* (1798), 4 Ves. 212, 216.

(*s*) Godolphin, Orphan's Legacy, Part II., c. 8, s. 6; *Camden* v. *Fletcher* (1838), 4 M. & W. 378.

(*t*) *In the Goods of Fitzpatrick* (1892), 29 L. R. Ir. 328.

(*a*) Godolphin, Orphan's Legacy, Part II., c. 8, s. 3.

(*b*) *Ibid.*, p. 101; *Long and Feaver* v. *Symes and Hannam* (1832), 3 Hag. Ecc. 771.

(*c*) *Hursell* v. *Bird* (1891), 65 L. T. 709.

SECT. The Executor de son tort.

of a deceased person from an executor *de son tort*, does not thereby himself become an executor *de son tort* (*d*), though, if he has taken the property with notice of a trust, it may be followed into his hands as trust property (*e*).

Taking possession of foreign assets only.

281. A person who takes possession of the foreign assets of a deceased person, without taking possession of his English assets, does not become executor *de son tort* (*f*).

Taking possession as agent for a rightful representative.

A person who takes possession of the effects under the authority of or as agent of a rightful executor, whether he has proved the will or not, cannot be charged as executor *de son tort* (*g*), and, though his authority may be revoked by the death of the rightful executor, so as to render him chargeable if, after his principal's death, he proceeds to act as an executor (*h*), yet the mere retention of the assets as a trustee for the persons beneficially entitled will not render him chargeable as executor *de son tort* (*i*).

Question of fact for jury; of result for judge.

282. The question of fact, whether a person has intermeddled, is one for the jury: the result of that intermeddling, *i.e.*, whether it constitutes the person an executor *de son tort*, is a matter of law for the judge to decide (*k*).

SUB-SECT. 2.—*The Effects of the Acts of an Executor de son tort upon the Property of the Deceased.*

Lawful acts bind the estate.

283. Generally speaking, all lawful acts done in the professed administration of the estate by a person purporting to act as executor, which a rightful executor would have been bound to perform in due course of administration, bind the estate (*l*). But where the alleged executor *de son tort* does one single act only of an administrative character, that act is not binding upon the estate. To render an act binding, it must be shown that at the time in question the executor *de son tort* was acting in the character of an executor (*m*).

SUB-SECT. 3.—*The Liabilities and Rights of an Executor de son tort.*

Liability to be sued.

284. The executor *de son tort* is liable to be sued by the rightful representative (*n*), a creditor (*o*), or a beneficiary (*p*). He is not

(*d*) *Paull* v. *Simpson* (1846), 9 Q. B. 365; *Hill* v. *Curtis* (1865), L. R. 1 Eq. 90, *per* PAGE WOOD, V.-C., at p. 97.
(*e*) *Hill* v. *Curtis*, *supra*.
(*f*) *Beavan* v. *Hastings* (*Lord*) (1856), 2 K. & J. 724.
(*g*) *Hall* v. *Elliot* (1791), Peake, 119 [86]; *Sykes* v. *Sykes* (1870), L. R. 5 C. P. 113.
(*h*) *Cottle* v. *Aldrich* (1815), 4 M. & S. 175.
(*i*) *Tomlin* v. *Beck* (1823), Turn. & R. 438.
(*k*) *Padget* v. *Priest* (1787), 2 Term Rep. 97.
(*l*) *Coulter's Case* (1599), 5 Co. Rep. 30 a; *Parker* v. *Kett* (1701), 1 Ld. Raym. 658, 661; *Buckley* v. *Barber* (1851), 6 Exch. 164, 183; *Thomson* v. *Harding* (1853), 2 E. & B. 630.
(*m*) *Mountford* v. *Gibson* (1804), 4 East, 441.
(*n*) Godolphin, Orphan's Legacy, Part II., c. 8, s. 2.
(*o*) *Kellow* v. *Westcombe* (1673), Freem. (K. B.) 122; 2 Bl. Com. 507.
(*p*) 1 Roll. Abr., 919, tit. Executors, F, 1.

SECT. 9. The Executor de son tort.

liable for more than has come to his hands (*q*), and he may, as against the rightful representative, set up in mitigation of damages all payments made by him in due course of administration (*r*); but it would appear that he cannot avail himself of this right of recoupment if the rightful representative is a creditor, and there are not sufficient assets left to pay his debt (*s*).

Answer to creditor's action.

285. As against a creditor he may plead *plene administravit* (*t*); or that he has, before action brought, handed over all the assets in his hands to the rightful representative (*a*), or has settled accounts with him (*b*). But it is no answer to the creditor that he has done so after action brought (*c*), nor can he obtain a valid discharge by handing over the assets to another who has himself never become a rightful representative of the deceased (*d*).

Various liabilities.

286. The executor *de son tort* is answerable for the acts of another when authorised and directed by him (*e*); he is responsible for the debts of an original testator when he has wrongfully administered to the latter's executor (*f*). He may be required to render the account, list and statement which it is the duty of an executor to render when an order has been made for the administration of the estate in bankruptcy (*g*). He renders himself also liable, in respect of the property which he has administered, to the payment of legacy duty (*h*), succession duty (*i*), estate duty (*k*), and statutory penalties (*l*).

(*q*) *Stokes* v. *Porter* (1559), 2 Dyer, 166 b; *Lowry* v. *Fulton* (1834), 9 Sim. 115; *Yardley* v. *Arnold* (1842), Car. & M. 434.

(*r*) *Padget* v. *Priest* (1787), 2 Term Rep. 97; *Fyson* v. *Chambers* (1842), 9 M. & W. 460, *per* Lord ABINGER, C.B., at p. 468. The decision in *Woolley* v. *Clark* (1822), 5 B. & Ald. 744, disallowing recoupment, probably went on the ground that the executor *de son tort* had not acted *bonâ fide;* see *Thomson* v. *Harding* (1853), 2 E. & B. 630, *per* Lord CAMPBELL, C.J., at p. 635.

(*s*) 2 Bl. Com. 508; *Mountford* v. *Gibson* (1804), 4 East, 441, 453; *Elworthy* v. *Sandford* (1864), 3 H. & C. 330. Under the old form of pleadings the executor *de son tort* could not, as against the rightful representative, plead his payments in abatement of the action (*Whitehall* v. *Squire* (1691), Carth. 104).

(*t*) *Oxenham* v. *Clapp* (1831), 2 B. & Ad. 309; *Yardley* v. *Arnold, supra.*

(*a*) *Padget* v. *Priest, supra.*

(*b*) *Hill* v. *Curtis* (1865) L. R. 1 Eq. 90, dissenting from *dicta* of Lord COTTENHAM, L.C., in *Carmichael* v. *Carmichael* (1846), 2 Ph. 101.

(*c*) *Curtis* v. *Vernon* (1790), 3 Term Rep. 587; affirmed *sub nom. Vernon* v. *Curtis* (1792), 2 Hy. Bl. 18, Ex. Ch.; *Layfield* v. *Layfield* (1834), 7 Sim. 172.

(*d*) *Sharland* v. *Mildon, Sharland* v. *Loosemoore* (1846), 5 Hare, 469; *Hill* v. *Curtis, supra,* at p. 100.

(*e*) *Re Ryan, Kenny* v. *Ryan,* [1897] 1 I. R. 513.

(*f*) *Meyrick* v. *Anderson* (1850), 14 Q. B. 719.

(*g*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 125. For administration of estates in bankruptcy, see title BANKRUPTCY, Vol. II., pp. 93 *et seq.*

(*h*) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 6. As to legacy and other death duties, generally, see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., pp. 180 *et seq.*

(*i*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), ss. 1, 44.

(*k*) *New York Breweries Co.* v. *A.-G.*, [1899] A. C. 62.

(*l*) The Acts imposing penalties are Stamp Act, 1815 (55 Geo. 3, c. 184), s. 37; Crown Suits etc. Act, 1865 (28 & 29 Vict. c. 104), s. 57; Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 40.

SECT. 9. The Executor de son tort.

Liability of his representative.

287. The executor or administrator of an executor *de son tort* who has wasted or converted to his own use any effects of a deceased person is under the same liability as his testator or intestate (*m*); but such representative is not liable for a breach of contract committed by the person with whose goods the executor *de son tort* has intermeddled (*n*).

No retainer, unless he obtains administration.

288. Though the executor *de son tort* may pay debts of an equal or superior degree, and even after action brought may dispose of the assets in discharge of a debt of superior degree (*o*), he cannot retain a debt of his own even of a higher degree, or with the assent of the rightful representative (*p*), unless he himself subsequently obtains administration (*q*).

Statutes of Limitation.

289. The executor *de son tort* may, in the absence of circumstances to raise a trust, rely upon the Statutes of Limitation (*r*).

Cannot be compelled to take a grant.

290. Though an executor who has acted can be compelled to take probate (*a*), a person who has intermeddled as executor *de son tort* cannot be compelled to take out letters of administration (*b*).

Execution against chattels real.

After judgment has been obtained by a creditor of the deceased against the executor *de son tort*, execution may issue against chattels real upon which the executor *de son tort* has entered (*c*).

Part II.—Probate and Letters of Administration.

SECT. 1.—*The Jurisdiction and Practice.*

SUB-SECT. 1.—*The Jurisdiction.*

Derivation of existing jurisdiction.

291. The existing jurisdiction with regard to granting and revoking probates and letters of administration dates from the 11th January, 1858, on which date (*d*) both the voluntary and contentious jurisdiction and authority of all the then existing courts, the chief of which were the ecclesiastical courts, were absolutely

(*m*) Stat. (1678), 30 Car. 2, c. 7, made perpetual by stat. (1693) 4 & 5 Will. & Mar. c. 24, s. 12. His liability would, however, be confined to the value of the assets of his immediate testator.

(*n*) *Wilson* v. *Hodson* (1872), L. R. 7 Exch. 84.

(*o*) *Oxenham* v. *Clapp* (1831), 2 B. & Ad. 309.

(*p*) Went. Off. Ex., 14th ed., p. 333; *Curtis* v. *Vernon* (1790), 3 Term Rep. 587; affirmed *sub nom. Vernon* v. *Curtis* (1792), 2 Hy. Bl. 18, Ex. Ch.; *Oxenham* v. *Clapp*, *supra*, *per* LITTLEDALE, J., at p. 313.

(*q*) *Williamson* v. *Norwitch* (1652), Sty. 337; *Vaughan* v. *Browne* (1739), 2 Stra. 1106. For executor's right of retainer, see p. 256, *post*.

(*r*) *Webster* v. *Webster* (1804), 10 Ves. 93; *Doyle* v. *Foley*, [1903] 2 I. R. 95. See title LIMITATION OF ACTIONS.

(*a*) See p. 142, *ante*.

(*b*) *In the Goods of Davis* (1860), 4 Sw. & Tr. 213.

(*c*) *Doherty* v. *Nelson*, [1895] 2 I. R. 90.

(*d*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77).

SECT. 1. **The Jurisdiction and Practice.**

determined (*e*), and were vested in the Crown to be exercised in the name of the Crown in a court known as the Court of Probate (*f*).

Establishment of the Court of Probate as a court of record.

292. The court was established as a court of record exercising the same powers throughout the whole of England as the Prerogative Court of the Archbishop of Canterbury then exercised in the province of Canterbury in relation to testamentary matters and causes and to the effects of deceased persons within its jurisdiction (*g*), with power to require the attendance of witnesses and the production of documents (*h*). The practice was to be that of the Prerogative Court of Canterbury. The principal probate registry was established in London and district registries in the provinces. The latter have no authority to entertain contentious business.

Limits to jurisdiction.

The Court of Probate was expressly prohibited from entertaining suits for legacies, or for the distribution of residues (*i*).

Existing jurisdiction of the Probate Division.

293. By virtue of the Judicature Act, 1873 (*k*), the Court of Probate, with other courts, became consolidated into the Supreme Court of Judicature (*l*). Its jurisdiction became vested in the High Court of Justice (*m*), to the Probate, Divorce, and Admiralty Division whereof probate matters were assigned (*n*). No cause or matter other than such as might have been commenced in the Court of Probate may be assigned to the Probate Division (*o*), but it would appear that the other branches of the High Court have jurisdiction to entertain probate proceedings, though they would in fact refrain from exercising such jurisdiction (*p*).

Powers of court.

294. The Probate Division has power to require the attendance of witnesses and the production of documents (*q*); it has also jurisdiction, whether an action or other proceeding is pending or not, to order the production of any instrument purporting to be testamentary. Where it is believed that any such paper is in the possession or under the control of any person, the court has power to require his attendance for the purpose of being examined either in open court or upon interrogatories (*r*). If the examination is not made upon interrogatories it must be made in open court;

(*e*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 3. As to origin and history of Ecclesiastical Courts, see title ECCLESIASTICAL LAW, Vol. XI., pp. 499 *et seq.*

(*f*) *Ibid.*, s. 4.

(*g*) *Ibid.*, s. 23.

(*h*) *Ibid.*, s. 24.

(*i*) *Ibid.*, s. 23.

(*k*) 36 & 37 Vict. c. 66; see, also, title COURTS, Vol. IX., pp. 51—62.

(*l*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 3.

(*m*) *Ibid.*, s. 16.

(*n*) *Ibid.*, s. 34. This division is hereafter for the sake of brevity referred to as the Probate Division.

(*o*) Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 11 (3).

(*p*) *Pinney* v. *Hunt* (1877), 6 Ch. D. 98, *per* JESSEL, M.R., at p. 101; *Bradford* v. *Young* (1884), 26 Ch. D. 656, *per* PEARSON, J., at p. 667, though such jurisdiction was denied by Sir J. HANNEN and by COTTON, L.J., in *Priestman* v. *Thomas* (1884), 9 P. D. 70, at pp, 76, 214, C. A.

(*q*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 26. For orders requiring the attendance of attesting witnesses, see *In the Goods of Sweet*, [1891] P. 400; *In the Goods of Bays* (1910), 54 Sol. Jo. 200.

(*r*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 26.

the court has no jurisdiction to order it to be made before a registrar (*s*). The person required to attend for the purpose of being examined is entitled to conduct money (*t*) and to be represented by counsel (*a*).

Orders for production of papers.

295. Applications for an order for the production of papers or writings purporting to be testamentary may be made to the judge, by motion or summons when an action is pending, and by motion upon affidavit when no action is pending (*b*).

Solicitor holding will has no privilege.

A solicitor holding a will for a client has no privilege in the matter, and may be ordered to lodge it in the probate registry (*c*).

Jurisdiction of registrars.

296. A registrar of the Probate Division has power to transact all such business and to exercise all such authority and jurisdiction in respect of the same, with certain exceptions, as a judge at chambers (*d*). A registrar of the principal registry has also statutory jurisdiction to issue a *subpœna* for the production of testamentary papers (*e*). It is very doubtful if such a *subpœna* can issue for service out of the jurisdiction, *e.g.*, in Scotland (*f*). Disobedience to a judge's order or registrar's *subpœna* is contempt of court.

Jurisdiction of county courts.

The jurisdiction of county courts in contentious probate matters has been dealt with elsewhere (*g*).

SUB-SECT. 2.—*The Business of the Court.*

Business of the court.

297. The business of the Probate Division is divided into common form business and contentious business. Common form business consists of the issue of grants of probate and letters of administration when there is no contention as to the right thereto, including the passing of probates and administrations through the court in contentious cases when the contest is terminated, and all business of a non-contentious nature taken in court in matters of testacy and intestacy, not being proceedings in any action, and also the business of lodging caveats against the grant of probate or administration (*h*). Citations and summonses may be issued in either non-contentious or contentious business. All other business of the court is contentious (*i*).

(*s*) *In the Goods of Laws* (1872), L. R. 2 P. & D. 458.

(*t*) *In the Estate of Harvey*, [1907] P. 239, commenting upon *In the Goods of Wyatt*, [1898] P. 15. As to conduct money generally, see title EVIDENCE, Vol. XIII., pp. 578 *et seq.*

(*a*) *In the Goods of Cope* (1867), 36 L. J. (P. & M.) 83.

(*b*) Probate Rules (Contentious), 1862, r. 73.

(*c*) *In the Estate of Harvey, supra.*

(*d*) R. S. C., Ord. 54, r. 12. The exceptions are set out in the rule.

(*e*) Court of Probate Act, 1858 (21 & 22 Vict. c. 95), s. 23. The jurisdiction of the registrar under this Act has not superseded the jurisdiction of the court under the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 26, to order production of testamentary papers upon motion (*In the Goods of Shepherd*, [1891] P. 323).

(*f*) In *Re Hamborough* (motion, November, 1894).

(*g*) See title COUNTY COURTS, Vol. VIII., pp. 644 *et seq.* As to contempt of court, see title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., pp. 280 *et seq.*

(*h*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 2.

(*i*) Probate Rules (Contentious), 1862, r. 3. As to citations, see p. 155, *post.* As to summonses, see p. 156, *post.*

SECT. 1. The Jurisdiction and Practice.

Survival of practice of Court of Probate.

298. The practice of the old Prerogative Court of Canterbury in non-contentious business still remains in force (*k*). The rules and orders of the old Court of Probate in contentious business remain in force in the Probate Division, except so far as they have been altered or annulled by any rules of court made since the merger of the old Court of Probate in the High Court of Justice (*l*).

Rules and orders.

The President for the time being of the Probate, Divorce, and Admiralty Division has with regard to non-contentious or common form business, and to the making of rules, the same powers as those which were formerly vested in the judge of the Court of Probate (*m*).

SUB-SECT. 3.—*Caveats.*

Caveats.

299. A person who intends to oppose the issuing of a grant of probate or letters of administration must either personally or by his solicitor enter a caveat in the principal registry or, if at the time of his death the deceased resided or had a fixed place of abode in a district, in the district registry (*n*).

Entry.

A caveat, which may be entered by anyone having or asserting an interest in the estate, remains in force for six months only, but may be renewed from time to time (*o*). After the entry of a caveat, no grant can issue unknown to the caveator. A caveat does not affect a grant made on the day on which it is entered (*p*).

The warning.

The person whose application is stopped by a caveat applies for a warning: a warning issues only out of the principal registry (*q*), and a copy of it must be left at the place mentioned in the caveat as the address of the person who entered it. The warning must state the name and the interest of the party on whose behalf it is issued and the date of the will and codicils, if any, under which he claims, and it must contain an address within three miles of the General Post Office for service of notices (*r*). It must be signed

(*k*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 29; *In the Goods of Caspari* (1896), 75 L. T. 663; *Druce* v. *Young*, [1899] P. 84, 101.

(*l*) Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 18; *Re Hailstone, Hopkinson* v. *Carter*, [1909] P. 118, C. A. The rules and orders now in force in non-contentious business for the Principal and District Probate Registries are as follows:—1862 (Principal Registry), 1863 (District Registries), 1866 (Principal and District Registries), 1871 (Principal Registry), 1871 (District Registries), 1873 (Principal and District Registries), 1882 (Principal and District Registries), 1887 (Principal and District Registries), 1892 (Principal Registry), 1894, 1896, and 1897 (Principal and District Registries).

The rules and orders in force in contentious business are those of 1862, 1865, and 1874, except so far as those rules and orders have been altered or annulled by the Rules of the Supreme Court.

(*m*) Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 18. For the powers of the judge of the Court of Probate, see the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), ss. 30, 53.

(*n*) Probate Rules (Non-Contentious), 1862, r. 59. The actual entry of a caveat is merely a ministerial act (*Re Panton*, [1901] P. 239). A caveat constitutes a direction that nothing should be done in the deceased's estate unknown to the caveator.

(*o*) Probate Rules (Non-Contentious), 1862, r. 60.

(*p*) *Ibid.*, r. 62.

(*q*) *Ibid.*, r. 63; the warning may be sent by post by the registrar (*ibid.*, r. 64).

(*r*) *Ibid.*, r. 65.

by a registrar, and gives notice to the caveator to enter an appearance at the principal registry within six days and to set out his interest.

Indorsement on warning.

After service, an indorsement thereof should be made on the warning. If no appearance is entered to a warning, the caveat is cleared off upon affidavit evidence as to service of the warning and as to search and non-appearance (*s*).

Commencement of proceedings.

Neither the caveat nor the entry of an appearance to the warning amount to the institution of proceedings in an action; it is not until a writ has been issued that there is litigation between the parties (*t*). The caveator may subduct or withdraw his caveat at any time before it is warned, or after the issue of a warning if six days have not elapsed from the date of the issue of the warning or the warning has not been served. This latter fact must be proved by affidavit. The caveat must be subducted at the registry at which it was entered.

If the caveator appears, no grant can issue without an order. If he wishes to appear after the expiration of the time named in the warning, he may issue a summons for leave to appear, provided the grant has not passed the seal.

If, after appearance, the parties come to terms, a summons on an application to discontinue proceedings can then be taken out, and, on the requisite order being made, the grant will issue in due course.

SUB-SECT. 4.—*Citations.*

Citations: (i.) nature of.

300. A citation is an instrument issuing from the principal probate registry under the seal of the court, signed by one of the registrars, containing a recital of the cause of issue and of the interest of the party extracting it, and giving a direction to the party cited to enter an appearance and take the steps specified therein, with an intimation of the nature of the order the court is asked to and may make, unless good cause is shown to the contrary (*a*).

(ii.) object of.

301. A citation is employed both in non-contentious and in contentious matters: its chief object in the former is to compel all persons having a prior (*b*) or equal right to a grant to come in and take the grant, or else to lose their right in favour of the applicant; in the latter, to compel a person to bring in a grant, or to propound a testamentary paper, or to bring a person before the court to see proceedings. The person cited to see proceedings is neither a plaintiff nor a defendant in the action, but he is brought before the court in order that his interests may be bound. The practice as to such citations has not been altered by the Judicature Acts or the rules framed thereunder (*c*).

(iii.) issue of.

302. Citations can be extracted only from the principal registry, and no citation is to issue under seal until an affidavit in verification

(*s*) Probate Rules (Non-Contentious), 1862, r. 67.
(*t*) *Moran* v. *Place*, [1896] P. 214, C. A.
(*a*) For this definition, see Tristram & Coote, Probate Practice, 14th ed., p. 257.
(*b*) *In the Goods of Harper*, [1899] P. 59.
(*c*) *Kennaway* v. *Kennaway* (1876), 1 P. D. 148.

SECT. 1. The Jurisdiction and Practice.

of the averments it contains has been filed in the registry (*d*). The affidavit verifying should not be made before the settlement of the draft citation. Before a citation is signed by the registrar a caveat must be entered against a grant being made, except in the case of a citation to exhibit an inventory, to render an account, or to show cause why a bond should not be assigned so that it may be enforced against the sureties (*e*).

(iv.) service of.

A copy of the citation must, where possible, be served personally upon parties resident in Great Britain or Ireland; the original citation must be shown if requested. If personal service cannot be effected, the direction of the judge or the registrars must be obtained as to the mode of service (*f*). It may be served upon parties resident out of Great Britain and Ireland by an advertisement settled and signed by one of the registrars (*g*). Service upon a minor or infant should be effected in the presence of his natural or legal guardian, or of the person upon whom the actual care and custody of the minor or infant for the time being has properly devolved (*h*); the next of kin of the minor or infant should be also served. Where the person cited is a lunatic, service upon his committee as well as upon the lunatic is required. Where there is no committee the service should be effected upon the lunatic in the presence of a medical man (*i*), and the next of kin of the lunatic should be also served. A certificate of service should be indorsed on the citation (*j*).

SUB-SECT. 5.—*Summonses.*

Summonses.

303. A summons may be issued by any person in any matter, whether contentious or non-contentious, with respect to which there is no rule or practice requiring a different mode of proceeding (*k*). A copy of the summons must be served on the party summoned one clear day at least before the summons is returnable (*l*). Separate summonses in contentious matters are exceedingly rare, except

(*d*) Probate Rules (Contentious), 1862, r. 13, and Probate Rules (Non-Contentious), 1862, r. 68. The affidavit of an attorney (by power) may be accepted (*In the Goods of Hutley* (1869), L. R. 1 P. & D. 596). The affidavit of the applicant's solicitor will not be accepted (*In the Estate of Luke* (1909), 25 T. L. R. 825).

(*e*) Probate Rules (Contentious), 1862, r. 15. As to caveats, see p. 154, *ante*.

(*f*) Probate Rules (Contentious), 1862, r. 18; Probate Rules (Non-Contentious), 1862, r. 69.

(*g*) Probate Rules (Contentious), 1862, r. 19; Probate Rules (Non-Contentious), 1862, r. 70.

(*h*) *Cooper* v. *Green* (1825), 2 Add. 454; *Brown* v. *Wildman* (1859), 28 L. J. (P. & M.) 54. Where both the custodian and the next of kin evaded service, service on the minor was held sufficient (*Lean* v. *Viner* (1864), 3 Sw. & Tr. 469; see, too, *Lainson* v. *Naylor* (1860), 2 Sw. & Tr. 7).

(*i*) *In the Goods of Surtees* (1859), 28 L. J. (P. & M.) 89; see, too, *McCormick* v. *Heyden* (1886), 17 L. R. Ir. 338, for service upon a lunatic in the presence of the proprietress of the asylum; and *In the Goods of Price, Watkins* v. *Bushell* (1904), 20 T. L. R. 540.

(*j*) *Goodburn* v. *Bainbridge* (1860), 2 Sw. & Tr. 4.

(*k*) Probate Rules (Contentious), 1862, r. 98.

(*l*) *Ibid.*, r. 100; *Re Hailstone, Hopkinson* v. *Carter*, [1909] P. 118, C. A., holding that the two days' notice required by R. S. C., Ord. 54, r. 4E, does not apply to the Probate Division.

summonses for discontinuance of contentious proceedings, and for a grant. Applications in chambers subsequent to the issue of the summons for directions and before judgment, whether before the judge or a registrar, are made by notice under the original summons. After judgment, however, separate summonses must be taken out.

Originating summonses.

304. A summons other than a summons in a pending cause is called an originating summons (*m*). Proceedings by originating summons are regulated by a rule of the Supreme Court (*n*), which provides that the originating summons must be prepared by the applicant or his solicitor, and sealed in the probate registry, the signature of the President being deemed to be equivalent to sealing (*o*); that the parties served with an originating summons must before they are heard (except in the instances next referred to) enter appearances at the probate registry and give notice thereof (*p*); but that where there is no pending cause or matter a respondent to the summons is not required to enter an appearance in matters relating to the acceptance of foreign sureties, applications for grants notwithstanding caveat, or leave to withdraw a caveat after warning (*q*).

SUB-SECT. 6.—*Motions.*

Motions.

305. In cases where a difficulty arises with reference to a grant, as, for instance, where there is a doubt as to the due attestation of a will, or where the testator's death has to be presumed, or where the applicant has an inferior title to the grant, application must be made to the Probate Court by motion, which must be accompanied by a case on motion containing a short epitome of the facts, with the names of the parties, dates, and the prayer of the applicant (*r*): if deficient it is not to be received, except by leave of a registrar (*s*).

Where notice of motion is required to be given, the practice is governed by the Rules of the Supreme Court (*t*).

SUB-SECT. 7.—*Appeals.*

Appeals.

306. An appeal lies from a registrar to the judge in chambers, and is governed by the rule relating to appeals from masters (*a*). Appeals from an order made by a judge of the Probate Division in chambers are to be regulated by the practice in the Chancery Division (*b*). An appeal lies to the Court of Appeal from an order

(*m*) R. S. C., Ord. 71, r. 1A.
(*n*) R. S. C., Ord. 54.
(*o*) *Ibid.*, r. 4B.
(*p*) *Ibid.*, r. 4C.
(*q*) *Ibid.*, r. 4F (10). See also R. S. C., August, 1894, and July, 1905, r. 9.
(*r*) Probate Rules (Contentious Business), 1874, r. 125. As to practice on motion, see further *In the goods of Wohlgemuth, deceased* (1910), 54 Sol. Jo. 460.
(*s*) *Ibid.*, r. 126.
(*t*) *Donovan* v. *Donovan* (1891), 91 L. T. Jo. 56; see R. S. C., Ord. 52, r. 5; and title PRACTICE AND PROCEDURE.
(*a*) R. S. C., Ord. 54, r. 21; *In the Goods of Patrick* (*John*) (1889), 14 P. D. 42, C. A.
(*b*) *Rigg* v. *Hughes* (1884), 9 P. D. 68, C. A.; see title PRACTICE AND PROCEDURE.

SECT. 1. The Jurisdiction and Practice.

made by a judge of the Probate Division in court (*c*), whether the matter is contentious or non-contentious (*d*).

SECT. 2.—*Of what Probate may be granted.*

SUB-SECT. 1.—*Documents of a Testamentary Character complying with the Statutory Requirements.*

Of what probate may be granted.

307. Every instrument purporting to be testamentary and executed in accordance with the statutory requirements (*e*) is entitled to probate if it disposes of property, whether personal or real (*f*), situated in England (*g*), or contains an appointment of an executor (*h*). A writing which merely revokes a former testamentary disposition without making any disposition of its own ought not to be admitted to probate (*i*), but the court may grant administration with the writing annexed (*k*). A will which merely appoints a guardian ought not to be admitted to probate (*l*).

A will disposing of property situated in this country, made in pursuance of a power of appointment and executed in compliance with the requisites of the power, may be proved in England, though not executed in accordance with the testamentary law of the domicil of the party making it (*m*). The grant, however, ought not to take the form of a grant of probate, but one of administration with the will annexed (*n*). The grant is conclusive that the testament proved is the will of the testator, but it is not conclusive as to its construction, or the rights to the property disposed of by the will (*o*). The will must be proved in England before the appointment can be acted upon (*p*).

Form of instrument immaterial.

308. The form of the instrument is quite immaterial, the sole requisites being (1) that it was intended by the testator to operate after his death, and (2) that it is executed in accordance with the statutory requirements (*q*). Thus instruments in the form of deeds

(*c*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 19.

(*d*) *Re Clook* (1890), 15 P. D. 132, C. A.

(*e*) For statutory requirements of the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), see title WILLS.

(*f*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1 (3).

(*g*) *In the Goods of Coode* (1867), L. R. 1 P. & D. 449.

(*h*) *In the Goods of Leese* (1862), 2 Sw. & Tr. 442; *In the Goods of Jordan* (1868), L. R. 1 P. & D. 555; *In the Goods of Hornbuckle* (1890), 15 P. D. 149.

(*i*) *In the Goods of Fraser* (1869), L. R. 2 P. & D. 40.

(*k*) *In the Goods of Hubbard* (1865), L. R. 1 P. & D. 53; *In the Goods of Hicks* (1869), L. R. 1 P. & D. 683.

(*l*) *In the Goods of Morton* (1864), 3 Sw. & Tr. 422; see, too, *Gilliat* v. *Gilliat and Hatfield* (1820), 3 Phillim. 222.

(*m*) *Tatnall* v. *Hankey* (1838), 2 Moo. P. C. C. 342; *In the Goods of Alexander* (1860), 29 L. J. (P. & M.) 93; *In the Goods of Hallyburton* (1866), L. R. 1 P. & D. 90; *In the Goods of Huber*, [1896] P. 209; *Murphy* v. *Deichler*, [1909] A. C. 446.

(*n*) *In the Goods of Tréfond*, [1899] P. 247; *In the Goods of Vannini*, [1901] P. 330. For letters of administration with the will annexed, see p. 194, *post*.

(*o*) *D'Huart* v. *Harkness* (1865), 34 Beav. 324; *Pouey* v. *Hordern*, [1900] 1 Ch. 492. For the effect of an exercise of a power, see title POWERS.

(*p*) *Re Vallance, Ex parte Limehouse Board of Works* (1883), 24 Ch. D. 177.

(*q*) *Habergham* v. *Vincent* (1793), 2 Ves. 204, 231; *Masterman* v. *Maberley* (1829), 2 Hag. Ecc. 235, 248; *Cock* v. *Cooke* (1866), L. R. 1 P. & D. 241; *In the Goods of Coles* (1871), L. R. 2 P. & D. 362. As to these requirements, see title WILLS.

so executed have been admitted to probate (*r*). The intention that it should operate after death need not appear on the face of the instrument, but may be proved by extrinsic evidence (*s*).

Incorporation of documents:

309. In certain cases documents referred to in a testator's will or codicil, though not themselves duly executed, may be incorporated in the will and included in the probate. Such a document must be strictly identified with the description contained in the will; parol evidence is admissible for the purpose of identification (*t*). The reference must be to a document as an existing document, and not to one which is to come into existence at a future date (*a*). If the will can be construed as referring equally to an existing or future document, parol evidence is not admissible (*b*). The onus of proving the identity of the document and its existence at the date of the will lies upon the party seeking to establish it (*c*).

(i.) Documents in existence at date of will.

A document not in existence at the date of the will, but which comes into existence before the execution of a subsequent codicil, may be included in the probate, if the will read as speaking at the date of the codicil contains language which would operate as an incorporation of the document to which it refers (*d*); but even so the language of the will must point to an existing document (*e*).

(ii.) Documents coming into existence prior to the date of a subsequent codicil.

Probate of codicils.

A codicil must be admitted to probate even where the will is not forthcoming (*f*) or has been revoked by destruction (*g*), notwithstanding that the codicil may thereby become unintelligible.

Several testamentary instruments.

310. Where two testamentary documents are executed on different dates, unless the later expressly or by implication revokes the earlier, both should be admitted to probate, upon the principle that every document purporting to be testamentary and duly executed ought to be admitted to probate (*h*). Where the documents are executed simultaneously, or it cannot be ascertained which was executed first, both are to be admitted to probate if upon any

(*r*) *In the Goods of Colyer* (1889), 14 P. D. 48; *Milnes* v. *Foden* (1890), 15 P. D. 105.

(*s*) *Robertson* v. *Smith* (1870), L. R. 2 P. & D. 43; *In the Goods of Slinn* (1890), 15 P. D. 156.

(*t*) *Allen* v. *Maddock* (1858), 11 Moo. P. C. C. 427; *In the Goods of Almosnino* (1859), 1 Sw. & Tr. 508; *In the Goods of Garnett*, [1894] P. 90; *Eyre* v. *Eyre*, [1903] P. 131.

(*a*) *In the Goods of Sunderland* (1866), L. R. 1 P. & D. 198; *In the Goods of Reid* (1868), 38 L. J. (P. & M.) 1; *Durham* v. *Northen*, [1895] P. 66; *In the Goods of Smart*, [1902] P. 238. *In the Goods of Hunt* (1853), 2 Rob. Eccl. 622, and *In the Goods of Stewart* (1863), 3 Sw. & Tr. 192, are not based upon any principle; see *In the Goods of Smart, supra, per* GORELL BARNES, J., at p. 241.

(*b*) *University College of North Wales* v. *Taylor*, [1908] P. 140, C. A.

(*c*) *Singleton* v. *Tomlinson* (1878), 3 App. Cas. 404.

(*d*) *In the Goods of Truro (Lady)* (1866), L. R. 1 P. & D. 201.

(*e*) *In the Goods of Smart, supra.*

(*f*) *Black* v. *Jobling* (1869), L. R. 1 P. & D. 685 (commenting on *Clogstoun* v. *Walcott* (1847), 5 Notes of Cases, 623, and *Grimwood* v. *Cozens* (1860), 2 Sw. & Tr. 364); *Gardiner* v. *Courthope* (1886), 12 P. D. 14; *In the Goods of Savage* (1870), L. R. 2 P. & D. 78.

(*g*) *In the Goods of Turner* (1872), L. R. 2 P. & D. 403.

(*h*) *Townsend* v. *Moore*, [1905] P. 66, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 77.

SECT. 2. Of what Probate may be granted.

reasonable construction the two documents can be so read as to stand together; if they cannot be so read neither is to be admitted to probate (*i*). For the above purposes the Probate Court must act as a court of construction (*k*). When a final will, not inconsistent with an earlier will, appoints a fresh executor, probate is granted of both instruments to both executors (*l*).

Joint wills.

311. Where two testators make their wills in one and the same instrument, upon the death of one probate is granted of so much of the instrument as then becomes operative (*m*).

Will made in duplicate.

312. Where a will has been made in duplicate, both parts must be lodged at the registry for a grant, but one part is handed back with the grant after collation.

Probate of contents of a lost will.

313. Where a testamentary instrument has been lost or destroyed in such a way as not to effect a revocation, probate may be granted of the contents thereof, upon proof of such contents and of the due execution and attestation of the instrument (*n*).

What evidence is necessary.

The person who sets up an alleged will and is unable to produce it, or any copy or draft of it, or any written evidence of its contents, is bound to prove its contents and its due execution and attestation by evidence which is so clear and satisfactory as to remove, not all possible, but all reasonable, doubts on those points (*o*). If he succeed in establishing an intention on the part of the alleged testator to do some formal act, and the evidence is consistent with that intention having been carried into effect in a proper way, the court may infer the actual observance of all due formalities as a matter of probability (*p*).

Evidence of a single witness.

Where alleged draft produced.

The contents of a lost will may be proved by the evidence of a single witness, though interested, whose veracity and competency are unimpeached (*q*); and, where an alleged draft of the lost will is produced, the court must take the parol evidence side by side with the alleged draft and thereout extract as best it may the contents of the will (*r*).

(*i*) *Phipps* v. *Anglesey* (*Earl*) (1751), 7 Bro. Parl. Cas. 443; *Townsend* v. *Moore*, [1905] P. 66, C. A. The court struggles to reconcile dispositions which on the face often might at first sight appear to be somewhat irreconcilable (*ibid.*). As to how far inconsistencies between a later and an earlier instrument amount to a revocation of the earlier, see title WILLS.

(*k*) *Lemage* v. *Goodban* (1865), L. R. 1 P. & D. 57; *Townsend* v. *Moore*, *supra*.

(*l*) *In the Goods of Morgan* (1867), L. R. 1 P. & D. 323; *In the Goods of Strahan*, [1907] 2 I. R. 484.

(*m*) *In the Goods of Piazzi-Smyth*, [1897] P. 7.

(*n*) *Brown* v. *Brown* (1858), 8 E. & B. 876.

(*o*) *Harris* v. *Knight* (1890), 15 P. D. 170, 179, C. A.

(*p*) *Harris* v. *Knight*, *supra*. The declaration of an alleged testator that he has made a will is not admissible as evidence of its due execution (*In the Goods of Ripley* (1858), 1 Sw. & Tr. 68; *Atkinson* v. *Morris*, [1897] P. 40, C. A.; *Eyre* v. *Eyre*, [1903] P. 131).

(*q*) *Sugden* v. *St. Leonards* (*Lord*) (1876), 1 P. D. 154, C. A.

(*r*) *Burls* v. *Burls* (1868), L. R. 1 P. & D. 472, 474. The post-testamentary declarations of a testator as to the contents of his will have been admitted by the Court of Appeal (*Sugden* v. *St. Leonards* (*Lord*), *supra*, overruling *Quick* v. *Quick and Quick* (1864), 3 Sw. & Tr. 442; *Gould* v. *Lakes* (1880), 6 P. D. 1), but

SECT. 2. Of what Probate may be granted.

Probate of lost will in solemn form.

314. As a general rule the court requires the lost will, even where there is a draft or copy in existence, to be proved in solemn form before admitting it to probate (*a*); but in a clear case probate may, with the consent of all parties interested under an intestacy, be granted upon motion, without requiring the will to be proved in solemn form (*b*). And when the estate is small the court may dispense with the consent of the parties interested under an intestacy (*c*).

Costs occasioned by negligence in losing will.

Where the original will has been lost or destroyed after the testator's death through the negligence of the executor, the court has jurisdiction to order him to pay the costs occasioned by the loss (*d*).

Probate of scripts, deposition, press copy, torn will.

If, in the absence of the original will, there is a true copy or draft of the will in existence, probate is granted of that copy or draft (*e*): if the contents have to be proved by parol testimony, probate is granted of an affidavit of scripts filed in the action, or of the deposition of a witness (*f*). Probate may also be granted of a press copy of a copy of the will (*g*). Where the contents of a lost will are not completely proved, probate will be granted to the extent to which they are proved (*h*).

Where a torn will is admitted to probate missing words will not be read into the will by the court, but when proved may be contained in a paper attached to the will (*i*).

SUB-SECT. 2.—*Privileged and Nuncupative Wills* (*k*).

Wills of soldiers.

315. The wills of soldiers on actual military service do not require to be in writing so far as they dispose of personal estate (*l*). The term "actual military service" is the equivalent of the Latin term "*in expeditione*"; it includes the case of a soldier who has taken some step towards joining the forces in the field (*m*), and that of a soldier whose battalion has been ordered to mobilise for active service (*n*), but not that of a soldier quartered at home during peace, though on full pay (*o*).

The term "soldier" includes an officer of every rank (*p*). A

the question of their admissibility has been expressly left open by the House of Lords (*Woodward* v. *Goulstone* (1886), 11 App. Cas. 469).

(*a*) *In the Goods of Barber* (1886), L. R. 1 P. & D. 267; *In the Estate of Carter* (1908), 52 Sol. Jo. 600.

(*b*) *Ibid.*

(*c*) *In the Goods of Apted*, [1899] P. 272, modifying *In the Goods of Pearson*, [1896] P. 289; see, too, *In the Goods of Brassington*, [1902] P. 1.

(*d*) *Burls* v. *Burls* (1868), L. R. 1 P. & D. 472.

(*e*) *In the Goods of Crofts* (1900), 17 T. L. R. 16; *In the Goods of Crandon*, [1901], 17 T. L. R. 341.

(*f*) See Tristram & Coote, Probate Practice, 14th ed., p. 97.

(*g*) *Lafone* v. *Griffin* (1909), 25 T. L. R. 308.

(*h*) *Sugden* v. *St. Leonards* (*Lord*) (1876), 1 P. D. 154, C. A.

(*i*) *Gill* v. *Gill*, [1909] P. 157; *In the Goods of Leigh*, [1892] P. 82; *In the Goods of Wright* (1910), 44 I. L. T. 137.

(*k*) A will made orally is known as a nuncupative will.

(*l*) Statute of Frauds (29 Car. 2, c. 3), s. 22; Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 11; and see, generally, title WILLS.

(*m*) *In the Goods of Hiscock*, [1901] P. 78.

(*n*) *Gattward* v. *Knee*, [1902] P. 99.

(*o*) *Drummond* v. *Parish* (1843), 3 Curt. 522.

(*p*) *In the Goods of Hayes* (1839), 2 Curt. 338.

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soldier on actual military service may make a valid will at and after the age of fourteen (*q*).

Wills of mariners and seamen.

316. The wills of mariners or seamen being at sea stand upon the same footing as those of soldiers on actual military service (*r*). The term "mariner or seaman" extends to officers of every rank (*s*), and to merchant seamen (*t*). The privilege extends to a person in maritime service serving on board a vessel permanently stationed in a harbour (*a*), or on service in a river (*b*); and a will made in the course of a voyage may in fact be made on shore (*c*).

Statutory restrictions.

Certain statutory restrictions exist with regard to the testamentary dispositions of seamen and marines (*d*): for the purpose of these restrictions the term "seaman or marine" is defined to mean a petty officer or seaman, non-commissioned officer of marines or marine, or other person forming part in any capacity of the complement of any of His Majesty's vessels, or otherwise belonging to His Majesty's naval or marine force, exclusive of commissioned, warrant, and subordinate officers, and assistant engineers, and of kroomen (*e*).

Examples of invalidity.

Thus a will made by a person while serving as a seaman or marine is not valid for any purpose if it is written or contained on or in the same paper, parchment, or instrument with a power of attorney (*f*); nor is a will made by a seaman or marine valid for the purpose of passing his naval assets unless it complies with certain statutory formalities (*g*).

Power of Admiralty to dispense with statutory requirements.

The Admiralty have, however, power to make payments to a person claiming under the will of a seaman or marine, though not made in compliance with the statutory formalities, where, having regard to the special circumstances of the death of the testator, they are of opinion that such formalities may be properly dispensed with (*h*).

Probate on motion.

A nuncupative will may be admitted to probate on motion (*i*).

SUB-SECT. 3.—*Wills of British Subjects out of the United Kingdom.*

Wills of British subjects.

317. A will or other testamentary instrument made out of the United Kingdom by a British subject, whatever his domicil at the

(*q*) *In the Goods of Farquhar* (1846), 4 Notes of Cases, 651; *In the Goods of Hiscock*, [1901] P. 78.

(*r*) Statute of Frauds (29 Car. 2, c. 3), s. 22; Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 11.

(*s*) *In the Goods of Hayes* (1839), 2 Curt. 338.

(*t*) *Morrell* v. *Morrell* (1827), 1 Hag. Ecc. 51; *In the Goods of Milligan* (1849), 2 Rob. Eccl. 108; *In the Goods of Parker* (1859), 2 Sw. & Tr. 375; and see titles SHIPPING AND NAVIGATION; WILLS.

(*a*) *In the Goods of M'Murdo* (1867), L. R. 1 P. & D. 540.

(*b*) *In the Goods of Austen* (1853), 2 Rob. Eccl. 611; *In the Goods of Patterson (Adam)* (1898), 79 L. T. 123.

(*c*) *In the Goods of Lay* (1840), 2 Curt. 375.

(*d*) See Navy and Marines (Wills) Acts, 1865 and 1897 (28 & 29 Vict. c. 72; 60 & 61 Vict. c. 15), and Order in Council of 28th December, 1865.

(*e*) Navy and Marines (Wills) Act, 1865 (28 & 29 Vict. c. 72), s. 2.

(*f*) *Ibid.*, s. 4.

(*g*) For the statutory formalities, see *ibid.*, s. 5, as amended by the Navy and Marines (Wills) Act, 1897 (60 & 61 Vict. c. 15), s. 1.

(*h*) Navy and Marines (Wills) Act, 1865 (28 & 29 Vict. c. 72), s. 7.

(*i*) *In the Goods of Scott*, [1903] P. 243. As to motions, see p. 157, *ante*.

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time of making the will or at his death, is, as regards personal estate, well executed for the purpose of being admitted to probate if it is made according to the forms required either by the law of the place where it was made, or by the law of the place where the testator was domiciled when it was made, or by the laws then in force in that part of His Majesty's dominion where he had his domicil of origin (*k*).

A will or other testamentary instrument made within the United Kingdom by a British subject (whatever his domicil at the time of making the same or at the time of his death) is, as regards personal estate, well executed and entitled to be admitted to probate, if executed according to the forms recognised by the laws for the time being in force in that part of the United Kingdom where the same was made (*l*).

"Personal estate" includes leaseholds. "British subject" includes a naturalised British subject.

318. For the above purposes "personal estate" includes leaseholds (*m*), and "British subject" includes a naturalised British subject (*n*), but regard must be had to any restriction in the certificate of naturalisation (*o*).

A will, whether of a British subject or not (*p*), is not revoked or invalidated by a subsequent change of domicil (*q*).

SUB-SECT. 4.—*Wills of Foreigners.*

Wills of persons dying domiciled abroad.

319. Where a person dies domiciled abroad, and it becomes necessary to prove his will in England, probate is granted of his will upon proof that the testator was domiciled in the country in question, and that either the foreign court has adopted his will as a valid testament, or that his will is valid by the law of that country (*r*).

Validity of a will proved in country of deceased's domicil.

320. The forms and solemnities of a will are governed by the law of the testator's domicil (*s*), and the English court has no

(*k*) Wills Act, 1861 (24 & 25 Vict. c. 114), s. 1. This Act is commonly known as Lord Kingsdown's Act. The Act does not validate an appointment in exercise of a power made by a will not complying with the provisions of the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26) (*Re Kirwan's Trusts* (1883), 25 Ch. D. 373); and see title POWERS. Where no specific form is required by the law of the country where the British subject is residing, it is sufficient that the courts of the country would have upheld the will (*Stokes* v. *Stokes* (1898), 78 L. T. 50). See, also, *Lyne* v. *De la Ferté and Dunn* (1910), 102 L. T. 143.

(*l*) Wills Act, 1861 (24 & 25 Vict. c. 114), s. 2.

(*m*) *Re Grassi, Stubberfield* v. *Grassi*, [1905] 1 Ch. 584.

(*n*) *In the Goods of Gally* (1876), 1 P. D. 438.

(*o*) *In the Goods of Gatti* (1879), 39 L. T. 639.

(*p*) *In the Estate of Groos*, [1904] P. 269.

(*q*) Wills Act, 1861 (24 & 25 Vict. c. 114), s. 3. For revocation of wills, see title WILLS.

(*r*) *Enohin* v. *Wylie* (1862), 10 H. L. Cas. 1; *In the Goods of Deshais, In the Goods of de Vigny (Countess)* (1865), 34 L. J. (P. M. & A.) 58; *Miller* v. *James* (1872), L. R. 3 P. & D. 4. For the qualification of an expert to prove the law, see *In the Goods of Bonelli* (1875), 1 P. D. 69; *In the Goods of Whitelegg*, [1899] P. 267; *Brailey* v. *Rhodesia Consolidated, Ltd.*, [1910] 2 Ch. 95; the certificate of the ambassador of the country under seal of the embassy is also accepted (*In the Goods of Dormoy* (1832), 3 Hag. Ecc. 767; *In the Goods of Klingemann* (1862), 3 Sw. & Tr. 1; see, too, *In the Goods of Dost Aly Khan* (1880), 6 P. D. 6). See, generally, titles CONFLICT OF LAWS, Vol. VI., pp. 218, 225; EVIDENCE, Vol. XIII., p. 488.

(*s*) *Bremer* v. *Freeman* (1857), 10 Moo. P. C. C. 306. As to colonial probates, see p. 173, *post*.

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jurisdiction to question the validity of the will of a person domiciled abroad when that will has been admitted to probate by the country in which the testator died domiciled (*t*). Where the testator was not a subject of the foreign country in which he died domiciled, and the courts of that country apply a particular and not the general law to the succession to his estate, the English court adopts the particular law (*a*). Where the will has been proved abroad it is the practice of the English court to require that any codicil should be proved in the court from which probate of the will has been obtained before granting probate of the codicil here (*b*).

Extent to which the English grant follows foreign grant.

321. The English court in making its own grant follows the foreign grant (*c*). Where probate has been granted by the foreign court to a person whose powers under the will fall short of the powers of an executor according to English law, the English grant is not of probate, but of letters of administration (with the will annexed) with powers corresponding as nearly as may be to those conferred by the will (*d*). The English court does not follow the foreign law so far as to make a grant to one who is personally disqualified by English law from taking the grant, as, for instance, a minor (*e*), nor will it make a grant to a foreign executor where, by the foreign law, the time for the execution of his executorship has expired (*f*).

Duly authenticated copy of will must be produced.

322. Where probate has been granted by the foreign court, the English grant is made upon the production of a duly authenticated copy of the will (*g*). If the original will forms part of the foreign probate the copy may be made in the English registry (*h*). The English grant being in general terms, probate will not be given of extracts only of a foreign will dealing with the testator's assets in England (*i*).

SUB-SECT. 5.—*Wills disposing of Property situated Abroad.*

Will solely of property abroad.

323. A will disposing only of property situated in a foreign country is not entitled to probate in England (*k*), nor are letters of

(*t*) *Whicker* v. *Hume* (1858), 7 H. L. Cas. 124.

(*a*) *Collier* v. *Rivaz* (1841), 2 Curt. 855; *Maltass* v. *Maltass* (1844), 1 Rob. Eccl. 67.

(*b*) *In the Goods of Miller* (1883), 8 P. D. 167.

(*c*) *In the Goods of Steigerwald* (1864), 10 Jur. (N. S.) 159; *In the Goods of Weaver* (1866), 36 L. J. (P. & M.) 41; *In the Goods of Earl* (1867), L. R. 1 P. & D. 450; *In the Goods of Hill* (1870), L. R. 2 P. & D. 89; *In the Goods of Scarr* (1899), 80 L. T. 296; *In the Goods of Meatyard*, [1903] P. 125. In *In the Goods of Gubbay* (1899) 80 L. T. 808, probate was granted of the exemplification of an Indian will and two codicils, notwithstanding that one of the codicils had been revoked.

(*d*) *In the Goods of Cosnahan* (1866), L. R. 1 P. & D. 183; *In the Goods of Von Linden*, [1896] P. 148; see, too, *In the Goods of Briesemann*, [1894] P. 260.

(*e*) *In the Goods of Orleans (Duchess)* (1859), 1 Sw. & Tr. 253; *In the Goods of Meatyard, supra.*

(*f*) *Laneuville* v. *Anderson and Guichard* (1860), 2 Sw. & Tr. 24.

(*g*) *Raymond* v. *de Watteville (Baron)* (1757), 2 Lee, 358. Where a translation of the original will has been admitted to probate in the foreign country, the English courts decree probate of a translation of such translation (*In the Goods of Rule* (1878), 4 P. D. 76); and see title CONFLICT OF LAWS, Vol. VI., p. 225.

(*h*) *In the Goods of Clarke* (1867), 15 W. R. 881.

(*i*) *In the Goods of Von Faber (Baroness)* (1904), 20 T. L. R. 640.

(*k*) *In the Goods of Coode* (1867), L. R. 1 P. & D. 449; *In the Goods of Tamplin*, [1894] P. 39; *In the Goods of Murray*, [1896] P. 65.

administration granted by the English court where the deceased left no property in England (*l*).

Practice in the case of two wills, one of property in England, the other of property abroad.

324. Where a testator has made two wills, one dealing with his property in England and the other with his property abroad, probate may be obtained of the former will upon an attested copy of the latter will annexed to an affidavit being filed (*m*). If the two wills are not independent, but the one incorporates the other, probate is granted of both wills as in fact constituting one will (*n*). Where it is the intention of the testator to keep the foreign and the English properties separate, probate issues of the English will alone (*o*).

SECT. 3.—*Probate in Common Form.*

SUB-SECT. 1.—*How and by whom obtained.*

Applications at Principal Registry.

325. In all cases the application for probate or for letters of administration may be made at the principal registry (*p*). Where the deceased resided abroad and in cases of resealing application must be made at the principal registry (*q*).

Powers of district registries to make grants.

326. Probates and letters of administration may be granted in common form by district registrars (*r*), where it is shown by affidavit that the deceased person had at the time of his death a fixed place of abode within the district in which the application is made (*s*). The affidavit is conclusive for authorising the grant by the district registrar (*t*), but the district registrar has no power to make a grant in any case in which there is a contention as to the grant, until the contention is terminated or disposed of (*a*). He must transmit notice of every application for a grant to the registrars of the principal registry (*b*), and in cases of doubt may take the direction of the judge (*c*).

(*l*) *In the Goods of Tucker* (1864), 34 L. J. (P. M. & A.) 29.

(*m*) *In the Goods of Astor* (1876), 1 P. D. 150; *In the Goods of Callaway* (1890), 15 P. D. 147; *In the Goods of De la Rue* (1890), 15 P. D. 185; *In the Goods of Seaman*, [1891] P. 253; *In the Goods of Fraser*, [1891] P. 285; *In the Estate of Paul, Gilmer* v. *Overman* (1907), 23 T. L. R. 716. In *In the Goods of Bolton* (1887), 12 P. D. 202, with the consent of the Belgian executor, probate was granted of both a Belgian and an English will to the English executor.

(*n*) *In the Goods of Howden (Lord)* (1874), 43 L. J. (P. & M.) 26; *In the Goods of Harris* (1870), L. R. 2 P. & D. 83; *In the Goods of De la Saussaye* (1873), L. R. 3 P. & D. 42; *In the Goods of Murray*, [1896] P. 65; *In the Goods of Western* (1898), 78 L. T. 49; *In the Goods of Green* (1899), 79 L. T. 738.

(*o*) *In the Goods of Schenley* (1903), 20 T. L. R. 127.

(*p*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 59.

(*q*) As to resealing, see p. 173, *post*.

(*r*) The Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 13 and Sched. A, establishes district registries throughout England. As to principal and district registries, see p. 152, *ante*. This and the succeeding paragraph apply to a grant of letters of administration as well as to a grant of probate. For the practice relating to the former grant, see also p. 193, *post*.

(*s*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 46. The practice is to prove residence within the district of the district registry by adding a paragraph to the oath of executor. For form of oath, see Encyclopædia of Forms and Precedents, Vol. XVI., p. 727.

(*t*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 47.

(*a*) *Ibid.*, s. 48.

(*b*) *Ibid.*, s. 49.

(*c*) *Ibid.*, s. 50.

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Applications to Inland Revenue officers where estate small.

327. In cases where the deceased died on or since the 2nd August, 1894, and the gross value of the property, real and personal, in respect of which estate duty (*d*) is payable on the death, exclusive of property settled otherwise than by the will of the testator does not exceed £500, or where the deceased died on or since the 1st June, 1881, and the gross personal estate does not exceed £300, applications for representation to the deceased may be made to an Inland Revenue officer (*e*). A deposit of 15*s.* is required for fees and expenses, and a further sum for the fixed duty of 30*s.* where the gross value does not exceed £300, and of 50*s.* where the gross value exceeds £300 and does not exceed £500 (*f*).

Right of executor to probate.

328. The only person entitled to a grant of probate is the executor, whether he be expressly appointed or merely by implication (*g*); the application for a grant may be made by the executor in person or through a solicitor (*h*).

Oath of executor.

The executor must be sworn to the truth of the will, the day of the testator's death, and the due performance of his duties in a document called "the Oath" (*i*). He must state therein the number of codicils (if any); a description of the testator; his relationship to the testator, if he is a near relative; and the gross value of the estate—of the realty and personalty, if the testator died on or after the 1st January, 1898, of the personalty only if the deceased died before that date. The testamentary paper or papers to which the executor is sworn must be marked by the executor and the person before whom he is sworn (*k*). The registrars may require proof, in addition to the oath, of the identity of the testator or of the party applying for the grant (*l*).

Inland Revenue affidavit.

329. The executor, or some other competent person (*m*), must also make an affidavit for the use of the Inland Revenue Commissioners, and he must specify to the best of his knowledge in appropriate accounts annexed to the Inland Revenue affidavit all the property in respect of which estate or other death duty

(*d*) For property in respect of which estate duty is payable and rates of duty, see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., pp. 183, 202.

(*e*) Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 33, as extended by Finance Act, 1894 (57 & 58 Vict. c. 30), s. 16.

(*f*) The fixed duty covers both legacy and succession duty (Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 36. Under the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 61 (2), a deduction is allowed from the value of property, subject to fixed duty, of the purchase-money charged or liable to be charged thereon. As to applications in cases of intestacy to registrars of county courts, see p. 193, *post*.

(*g*) *Wankford* v. *Wankford* (1703), 1 Salk. 299, 309.

(*h*) Probate Rules (Non-Contentious), 1862, r. 2.

(*i*) The executor's oath is to be subscribed and sworn by him as an affidavit and then filed in the registry (Probate Rules (Non-Contentious), 1862, r. 47), but he may affirm if he object to being sworn; see Oaths Act, 1888 (51 & 52 Vict. c. 46). For methods of being sworn in England and abroad, see Commissioners for Oaths Acts, 1889 and 1891 (52 & 53 Vict. c. 10; 54 & 55 Vict. c. 50), and Oaths Act, 1909 (9 Edw. 7, c. 39).

(*k*) Probate Rules (Non-Contentious), 1862, r. 49. The "marking" consists of the deponent to the oath and the person before whom he is sworn signing their names on the testamentary papers referred to in the oath.

(*l*) *Ibid.*, r. 48.

(*m*) *In the Goods of Urruela* (1869), L. R. 1 P. & D. 598.

is payable and all the property passing upon the death of the testator (*n*).

Engrossment of will.

330. A copy of the will and codicils (if any) is engrossed on official engrossment sheets, and, after the Inland Revenue affidavit is passed at the Estate Duty Office, all the documents, including the original will and codicils (if any), are left at the probate registry; whereupon the form of grant is filled up at the registry and annexed to the engrossment and the record thereof completed (*o*).

Proof of due execution of the will.

331. If the will be perfect on the face of it, and there is an attestation clause reciting in effect that the statutory requirements (*p*) have been complied with, probate in common form issues upon the oath of the executor alone; if there be no attestation clause, or the clause be insufficient, an affidavit is required from at least one of the attesting witnesses, if either of them is living, that the statutory requirements were in fact complied with (*q*); if both the witnesses are dead, resort must be had to other persons (if any) who may have been present at the execution, and, in the absence of such evidence, affidavit evidence must be procured of the handwriting of the testator and of the attesting witnesses, and also of any circumstances which may raise a presumption in favour of the due execution of the will (*r*). If on reading the affidavits of both the attesting witnesses it appears that the statutory requirements were not complied with, probate must be refused (*s*); in a case of doubt the registrar may require the parties to bring the matter before the judge on motion (*a*).

Wills of blind or illiterate persons.

332. Before allowing probate to issue of a will of a person who was blind or obviously illiterate or ignorant, the registrar must satisfy himself that the will was read over to the testator before being signed and that he understood it, or that he had at such time knowledge of its contents (*b*). When a testator makes his mark through inability to sign, an affidavit of due execution is always required.

Evidence in case of interlineations or alterations.

333. When interlineations or alterations appear in the will (unless duly executed, or recited in, or otherwise identified by the

(*n*) Stamp Act, 1815 (55 Geo. 3, c. 184), s. 38, and Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (3). The forms of the requisite affidavits are prescribed by the Treasury under the Customs and Inland Revenue Act, 1881 (44 & 45 Vict c. 12), s. 29; see on this subject title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 215; see also Encyclopædia of Forms and Precedents, Vol. XVI., p. 688.

(*o*) The details for proving a will are fully set out in Tristram & Coote's Probate Practice, 14th ed., pp. 22 *et seq.* In pursuance of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), ss. 66, 67, the originals of the wills proved in the principal registry or in one of the district registries are deposited at the place of proof for safe custody. Calendars of all grants of probate and administration, whether made at the principal registry or district registries, are kept at the principal registry for inspection purposes.

(*p*) For the statutory requirements of a will, see title WILLS.

(*q*) Probate Rules (Non-Contentious), 1871, r. 4.

(*r*) Probate Rules (Non-Contentious), 1862, r. 7.

(*s*) *Ibid.*, r. 5.

(*a*) *Ibid.*, r. 6.

(*b*) *Ibid.*, r. 71.

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attestation clause), affidavit evidence of their having existed in the will before its execution must be filed, except when the alterations are merely verbal, or when they are of small importance and are evidenced by the initials of the attesting witnesses (*c*).

Erasures and obliterations.

334. Erasures and obliterations are not to prevail unless proved to have existed in the will at the time of its execution, nor unless the alterations thereby effected in the will are duly executed and attested, nor unless they have been rendered valid by the re-execution of the will, or by the subsequent execution of a codicil thereto. If no satisfactory evidence can be adduced as to the time when such erasures and obliterations were made, and the words erased or obliterated are not entirely effaced, but can upon inspection of the paper be ascertained, they must form part of the probate (*d*). In every case of words having been erased or obliterated which might have been of importance, an affidavit is required (*e*). The court will allow the use of artificial means to decipher the original words or figures, but will not resort to physical interference with the document (*f*). A magnifying glass may be used, but not chemicals. When alterations, interlineations, or obliterations are to stand, a copy must be filed similar to the engrossment to show how the grant has gone out. When they are not to stand, a copy of the will without such alterations has to be filed and a registrar's fiat setting aside such alterations obtained. When there is pencil writing on the will or codicils, a further red ink copy must be also filed for the perpetuation of the pencil writing.

Practice in deciphering.

Misdescription of executor.

335. Where the will contains a misdescription or an insufficient description of the person nominated as executor, the grant goes to the person who according to the evidence was actually intended by his correct description, with the addition of the description written in the will (*g*).

Practice as regards clerical errors.

336. Similarly, where the will contains a clerical error (*h*), the word inserted in error will be struck out of the grant, no fresh word being inserted in the blank (*i*). The court has also power to omit from the probate the signature of a third person at the foot of a will which already bears the signatures of two attesting witnesses, upon being satisfied that the third signature was not added with the object of attesting the will (*k*).

(*c*) Probate Rules (Non-Contentious), 1862, r. 9. As to effect of alterations in wills, see, further, title WILLS.

(*d*) *Ibid.*, r. 10.

(*e*) *Ibid.*, r. 11.

(*f*) *Ffinch* v. *Combe*, [1894] P. 191.

(*g*) *In the Goods of De Rosaz* (1877), 2 P. D. 66; *In the Goods of Cooper*, [1899] P. 193; *In the Goods of Baskett* (1898), 78 L. T. 843.

(*h*) *In the Goods of Bushell* (1887), 13 P. D. 7; *In the Goods of Huddleston* (1890), 63 L. T. 255.

(*i*) *In the Goods of Schott*, [1901] P. 190, overruling *In the Goods of Bushell*, *supra*, on this point.

(*k*) *In the Goods of Sharman* (1869), L. R. 1 P. & D. 661; *In the Goods of Smith* (1889), 15 P. D. 2.

Offensive passages.

337. Offensive passages may also be omitted from the probate and from the copy of the will to be inserted in the books of the registry (*l*), but this is a power to be exercised with great moderation (*m*).

Probate issues after seven days, letters of administration after fourteen days.

338. No probate or letters of administration with the will annexed can be issued until after the lapse of seven days from the death exclusive of the day of death (*n*); and no letters of administration until after the lapse of fourteen days exclusive of the day of death (*o*), except under the direction of the judge, or by order of two of the registrars. A like order may be made by one of the registrars of the principal registry when the grant is at a district registry (*p*).

Reason for delay.

Where probate or administration is first applied for after the lapse of three years from the death, the reason for the delay must be certified, and the registrars are empowered to require proof of the alleged cause of delay (*q*). A certificate by the solicitor or an affidavit by the applicant must be filed in explanation of the delay.

Certificate of delay.

Precise date of death.

339. Where the applicant for a grant is unable to depose to the precise date of death, it becomes necessary for him to obtain the leave of the court to swear the date of death. According to the usual practice he is required to depose in his affidavit in support of the application to his personal belief that the death occurred on or after a particular date (*r*), but the court does not always insist upon a statement of personal belief (*s*).

All letters referred to in the applicant's affidavit should be exhibited to the affidavit or accounted for (*t*).

Presumption as to death.

340. The presumption of law is that a person is dead at the expiration of seven years from the time he was last known to be living (*u*), unless some reason can be given for his not having been heard of during those seven years. The court will, however, on proof of sufficient inquiries, allow the death of a testator to be sworn after a disappearance of less than seven years (*a*).

There is no legal presumption as to a person having died at any

(*l*) *In the Goods of Wartnaby* (1846), 1 Rob. Eccl. 423; *Curtis* v. *Curtis* (1825), 3 Add. 33; *Marsh* v. *Marsh* (1860), 1 Sw. & Tr. 528.

(*m*) *In the Goods of Honywood* (1871), L. R. 2 P. & D. 251.

(*n*) Probate Rules (Non-Contentious), 1862, r. 43.

(*o*) *Ibid.*, r. 44.

(*p*) District Registry Rules, 1863, r. 51.

(*q*) Probate Rules (Non-Contentious), 1862, r. 45. A "certificate of delay" on a printed form is frequently used and accepted.

(*r*) *In the Goods of Hurlston*, [1898] P. 27.

(*s*) *In the Estate of Walker*, [1909] P. 115.

(*t*) *In the Goods of Clarke*, [1896] P. 287; see, too, *In the Goods of Saul*, [1896] P. 151.

(*u*) *Doe* d. *Knight* v. *Nepean* (1833), 5 B. & Ad. 86; affirmed on this point, *Nepean* v. *Doe* d. *Knight* (1837), 2 M. & W. 894, Ex. Ch. As to presumption of death in general, see title EVIDENCE, Vol. XIII., pp. 500 *et seq.*

(*a*) *In the Goods of Matthews*, [1898] P. 17; see, too, *In the Goods of Winstone*, [1898] P. 143.

SECT. 3. Probate in Common Form.

particular date during the seven years (*b*), or as to his having died without issue (*c*).

As a rule, the order to presume death must be an order of the court obtained on motion, but where the whole personal estate does not exceed £100, or where an order has been already made by the court in the case of one person killed in the same accident, *e.g.*, a shipwreck, a registrar may make the order.

Commorientes.

341. Where two people perish by the same calamity, the court refuses to presume that they died at the same moment (*d*); in the absence of any evidence as to which survived the other, the court gives leave to swear the death of each, allowing the applicant in each case to vary the usual form of oath by stating therein that there is no reason to believe that either survived the other (*e*).

SUB-SECT. 2.—*Limited Probates.*

Limited probate.

342. In certain cases a limited grant of probate is made.

Codicil only.

343. Where a testator appoints a separate executor for the purpose of carrying into effect the trusts and dispositions of a codicil, probate limited to the trusts and dispositions of the codicil is granted to such executor. A similar grant is made to a person who is appointed executor for a special purpose or in respect of a specific fund only.

Grants *cæterorum.*

If the special executor obtain his grant first, the subsequent grant made to the general executor is called a *cæterorum* grant. If

Grants save and except.

the general executor be the first to apply, he obtains a grant, save and except the property in respect of which the special executor has been appointed.

Grant limited to property appointed.

344. Where a testator has made a will in exercise of a special power of appointment which is not revoked by his subsequent marriage, the court grants administration with the will annexed to the appointee limited to the property appointed (*f*).

Grant limited to time.

345. Probate of the contents of a lost will is limited until the original (or a more authentic copy) is brought into the registry (*g*). A similar limitation is contained in the probate of a copy of the will of a British subject made abroad when the original is detained in a foreign country (*h*).

General grant in the case of a married woman.

346. In the case of a will made by a woman during coverture, it is no longer the practice to recite in the oath or the grant the

(*b*) *In the Goods of Smith* (1861), 2 Sw. & Tr. 508; *Re Phené's Trusts* (1870), 5 Ch. App. 139; *Re Aldersey, Gibson* v. *Hall*, [1905] 2 Ch. 181.

(*c*) *Re Jackson, Jackson* v. *Ward*, [1907] 2 Ch. 354.

(*d*) *Underwood* v. *Wing* (1855), 4 De G. M. & G. 633.

(*e*) *In the Goods of Ewart* (1859), 1 Sw. & Tr. 258; *In the Goods of Beynon*, [1901] P. 141; *In the Goods of Good* (1908), 24 T. L. R. 493; *In the Estates of Bruce* (*M.*) *and Bruce* (*G. M.*) (1910), 26 T. L. R. 381.

(*f*) *In the Goods of Russell* (1890), 15 P. D. 111. For the non-revocation by a subsequent marriage of a will made in exercise of a special power of appointment see the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 18; and title WILLS.

(*g*) For lost wills, see p. 160, *ante*.

(*h*) *In the Goods of Lemme*, [1892] P. 89.

existence of separate personal estate of the testatrix or the power or authority under which the will has been made. The grant, whether of probate, or of letters of administration with the will annexed, now takes the form of an ordinary grant without any exception or limitation (*i*). Consequently the fact that a husband now proves his wife's will in general form does not amount to an assent to his wife's disposition (*k*).

SUB-SECT. 3.—*Second and Cessate Grants.*

Second and cessate grants.

347. Where a testator has directed that in a certain event some other person shall be substituted for his original executor, that other person becomes entitled upon the happening of the event to a grant in his own favour (*l*). Such a grant is known as a second grant. The substituted executor takes the executor's oath, but swears the estate at the value only of what remains undistributed. A second grant is also required upon the death of a person who has taken a grant for the use and benefit of a person under disability, and a cessate grant is made on the removal of a disability. Where a grant has been made of the contents of a lost will, a second grant is made upon the production of the original. Where a codicil is found after probate of a will, a second grant is sometimes made.

Double grants.

348. Where one or some only of several executors have in the first instance obtained probate and subsequently another executor desires to come in and take probate, he obtains what is known as double probate. In such a case the value of the estate is limited in the oath to that which remains unadministered, but the grant is made in general terms.

An Inland Revenue affidavit (*m*) is necessary in every case, and must be lodged at the Estate Duty Office with a memorial impressed with a duty-paid stamp thereon or a certificate that duty has been paid (*n*).

The cessate administrator may call upon the original administrator at any short time after the determination of the original administration to exhibit an inventory and account (*o*). The order is usually obtained upon summons.

(*i*) Probate Rules (Non-Contentious), 1887, rr. 15, 18, following the decision in *In the Goods of Price* (1887), 12 P. D. 137. Where a woman dies testate, leaving property which she had no power to dispose of by will, the husband is entitled to a grant of letters of administration to such of his wife's property as she had no power to dispose of (*In the Goods of Leman*, [1898] P. 215). As to the capacity of a married woman to make a will, see title WILLS.

(*k*) *Re Atkinson, Waller* v. *Atkinson*, [1899] 2 Ch. 1, C. A.

(*l*) *In the Goods of Foster* (1871), L. R. 2 P. & D. 304.

(*m*) As to the appropriate form of Inland Revenue affidavit, see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 215.

(*n*) For the practice in the case of second and double grants, see Probate Act, 1858 (21 & 22 Vict. c. 95), s. 20, and Tristram & Coote, Probate Practice, 14th ed., pp. 154 *et seq.*; see, too, *In the Goods of Griffin* (1910), 54 Sol. Jo. 378. As to memorial on application for grants *de bonis non*, see p. 195, *post*.

(*o*) *Taylor* v. *Newton* (1752), 1 Lee, 15.

SECT. 3. SUB-SECT. 4.—*Resealing Irish, Scotch, and Colonial Grants.*

Probate in Common Form.

Resealing Irish, Scotch, and Colonial grants.

349. Probate or letters of administration granted by the Irish court may be produced to a registrar of the English court for sealing with the English seal. When so sealed they are of the like force and effect and have the same operation in England as though originally granted there (*p*).

Certificate required.

350. Before they are sealed a certificate must be obtained from the Commissioners of Inland Revenue or their proper officer that the grant of probate or letters of administration is duly stamped in respect of the duty on the personal estate and effects of which the deceased died possessed in England (*q*). For the same purpose English estate must be shown in the certificate, even though it be only trust estate. In the case of letters of administration a certificate of a registrar of the Irish court must also be filed that a bond has been given to the Irish court in a sum sufficient to cover the property in England as well as in Ireland in respect of which the administration is required to be resealed (*r*). A foolscap copy of the Irish grant must also be lodged for filing in the English registry. An application for resealing may be made by an agent who need not be a solicitor.

Estates under £500 gross.

In the case of estates under the gross value of £500, the Irish grant is resealed by the English court upon the payment of a fee of 2*s.* 6*d.* (*s*).

Where documents must be lodged.

For the purpose of obtaining the seal of the English court, the necessary documents and fees may be deposited at the registry out of which the Irish grant issued, or they may be deposited in the English registry. The converse of this practice holds good in the case of resealing English grants in Ireland (*t*).

Scotch confirmations.

351. Where a person dies domiciled in Scotland any personal estate or effects situated in England or Ireland, or both, may be included in the inventory of his personal estate and effects. The value of such effects must be separately stated in the inventory, and the latter must be impressed with a stamp corresponding to the entire value of the estate and effects included therein, wherever situated in the United Kingdom (*u*). Upon the production of the Scotch confirmation to the English court, and the deposit of a copy thereof with the registrar, the confirmation may be sealed with the seal of the English court, and thereafter will have the like force and effect in England as if probate or letters of administration, as the case may be, had been granted by the English court (*a*). The

(*p*) Probates and Letters of Administration Act (Ireland), 1857 (20 & 21 Vict. c. 79), s. 95; see also title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 312.

(*q*) Probate Rules (Non-Contentious), 1862, r. 73.

(*r*) Court of Probate Act, 1858 (21 & 22 Vict. c. 95), s. 29.

(*s*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 16 (4).

(*t*) Ord. 79, r. 75A, of the Supreme Court of Judicature, Ireland; and Probate Rules (Non-Contentious), 1896, r. 108.

(*u*) Confirmation of Executors (Scotland) [or Confirmation and Probate] Act, 1858 (21 & 22 Vict. c. 56), s. 9.

(*a*) *Ibid.*, s. 12.

confirmation must bear the seal of the Scotch court and must contain in the body of it a statement that the deceased died domiciled in Scotland and possessed assets in England (*b*).

Resealing of additional confirmations.

352. Additional confirmations of the Scotch court may be resealed in a similar manner, whether the original confirmation has been resealed or not, and although the additional inventory confirmed does not contain any estate situated in Scotland (*c*). Where, however, an original confirmation does not include any Scotch property, it cannot be resealed. When it is desired to reseal an English grant in Scotland, the fact that the deceased died domiciled in England must be stated in the oath to lead the English grant, or in a special affidavit, in order that the English domicil may be noted on the English grant, for, without such notation, resealing in Scotland cannot take place (*d*).

Estates under £500 gross.

In the case of estates not exceeding a gross value of £500, the Scotch confirmation may be sent by the commissary clerk in Scotland to the English court for resealing (*e*). There is no fee for resealing such a grant, and no copy need be filed in the English registry.

An agent who is not a solicitor may lodge the necessary papers in the English registry.

Colonial grants.

353. The English court has a similar power of resealing colonial grants (*f*). The English court must first be satisfied that probate (or estate) duty has been paid in respect of so much of the estate as is liable to such duty in the United Kingdom, and, in the case of letters of administration, that security has been given in a sum sufficient in amount to cover the property in the United Kingdom to which the letters of administration relate (*g*). The English court may also, on the application of a creditor, require, before sealing, that adequate security be given for the payment of debts due from the estate to creditors in the United Kingdom (*h*). A sealed duplicate or certified copy of the colonial grant may be resealed in England (*i*). If the attorney of a colonial executor applies to reseal, he does not give a bond, though in all other cases of attorney grants a bond is necessary.

Requirements on resealing.

The provisions relating to colonial grants are also applicable to

(*b*) Confirmation of Executors (Scotland) [or Confirmation and Probate] Act, 1858 (21 & 22 Vict. c. 56), s. 12, as extended by the Sheriff Courts (Scotland) Act, 1876 (39 & 40 Vict. c. 70), s. 42.

(*c*) Sheriff Courts (Scotland) Act, 1876 (39 & 40 Vict. c. 70), s. 42. The expression "additional confirmation" is here intended to include *eiks*, *ad non executa*, and *ad omissa* grants.

(*d*) Confirmation of Executors (Scotland) [or Confirmation and Probate] Act, 1858 (21 & 22 Vict. c. 56), s. 14.

(*e*) Intestates' Widows and Children (Scotland) Act, 1875 (38 & 39 Vict. c. 41), s. 3; Small Testate Estates (Scotland) Act, 1876 (39 & 40 Vict. c. 24), s. 3, as extended by Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 34; and Finance Act, 1894 (57 & 58 Vict. c. 30), s. 23 (7).

(*f*) Colonial Probates Act, 1892 (55 & 56 Vict. c. 6). The Act extends to British possessions, to which it has been directed to apply by Orders in Council. For a list of such possessions, see title DEPENDENCIES AND COLONIES, Vol. X., p. 559.

(*g*) Colonial Probates Act, 1892 (55 & 56 Vict. c. 6), s. 2 (2).

(*h*) *Ibid.*, s. 2 (3).

(*i*) *Ibid.*, s. 2 (4).

SECT. 3. Probate in Common Form.

probate or letters of administration granted by a British court in a foreign country (*j*).

A limited colonial grant may be resealed in England (*k*).

Notice of an intended application for resealing must be advertised and the advertisement exhibited to the oath to lead the grant.

SECT. 4.—*Probate in Solemn Form.*

SUB-SECT. 1.—*Who may obtain Probate in Solemn Form.*

Proof in solemn form.

354. If there should be any doubt as to the validity of a will or any apprehension that there may be opposition to it, it is open to the executor to prove it in solemn form. To obtain such proof he must commence a probate action and either by service of the writ, or by citation to see proceedings, bring in all persons (including the heir-at-law where the testator has disposed of real estate), who would be entitled in distribution to the estate of the testator in case he had died intestate. The court must satisfy itself of the due execution of the will and of the testamentary capacity of the testator (*l*).

Validity of a codicil in doubt.

355. An executor who doubts the validity of a codicil should not cite the persons interested under the codicil to propound it, but should proceed to prove the will in solemn form, and cite the next of kin and the persons interested under the codicil to see the will proved (*m*). An executor who has proved a will in common form cannot, as executor, take proceedings to call in question the validity of that will (*n*).

Persons entitled to call for proof in solemn form.

356. The next of kin as such are entitled of common right to call for proof in solemn form: the heir is also entitled: similarly a legatee or devisee, whose legacy or devise has been omitted from the probate, and an executor, legatee, or devisee named in any other testamentary instrument of the deceased, whose interest is adversely affected by the will in question (*o*). The mere acquiescence of one of the next of kin in probate being granted in common form is no bar to the exercise of this right by him, even though he has received a legacy under the will (*p*); but he must bring into court the amount of his legacy (*q*), unless he be a minor (*r*). Long acquiescence may prove a bar, unless the party can account satisfactorily for the delay (*s*).

(*j*) Colonial Probates Act, 1892 (55 & 56 Vict. c. 6), s. 3. Special rules have been framed for carrying out the provisions of the Act, (namely, Rules (Non-Contentious) of 7th December, 1892, Nos. 92 to 105).

(*k*) *In the Goods of Smith*, [1904] P. 114. In *In the Goods of Sanders*, [1900] P. 292, a colonial grant was allowed to be resealed, though the deceased left no assets in this country, there being, however, under the will of a third person a legacy due to the deceased's representatives.

(*l*) *Belbin* v. *Skeats* (1858), 1 Sw. & Tr. 148.

(*m*) *In the Goods of Benbow* (1862), 2 Sw. & Tr. 488. As to citations generally, see p. 155, *ante*.

(*n*) *In the Goods of Chamberlain* (1867), L. R. 1 P. & D. 316.

(*o*) See Tristram & Coote, Probate Practice, 14th ed., p. 314.

(*p*) *Bell* v. *Armstrong* (1822), 1 Add. 365; *Core* v. *Spencer* (1796), cited Add. 374; *Merryweather* v. *Turner* (1844), 3 Curt. 802.

(*q*) *Bell* v. *Armstrong*, *supra*; *Braham* v. *Burchell* (1826), 3 Add. 243, 256.

(*r*) *Goddard* v. *Norton* (1846), 5 Notes of Cases, 76.

(*s*) *Newell* v. *Weeks* (1814), 2 Phillim. 224, 232.

357. An executor who is cited to propound a will in solemn form does not, by failing to appear to such citation, debar himself from subsequently obtaining probate of the will, if the court pronounce for it in the action. A citation to propound a will differs from, and has not the same effect as, a citation to take probate (*t*).

Failure of executor to appear to a citation.

SUB-SECT. 2.—*Method of obtaining.*

358. The action (*a*) to obtain probate in solemn form must be commenced by the issue of a writ of summons indorsed with a statement of the nature of the claim made (*b*); the indorsement must show the character in which the plaintiff claims (*c*). The issue of the writ must be preceded by the filing of an affidavit made by the plaintiff or one of the plaintiffs in verification of the indorsement on the writ (*d*). A writ of summons or notice thereof may by leave of the court or a judge be served out of the jurisdiction (*e*). The service of the writ and the entry of an appearance thereto are governed by the general rules of the Supreme Court (*f*). The pleadings in a probate action are also generally governed by the same rules.

The writ of summons.

Where the plaintiff in a probate action disputes the interest of the defendant, he must allege in his statement of claim that he denies the defendant's interest (*g*).

Plaintiff disputing interest of defendant.

359. The defence must state what is the substance of the case on which the defendant relies, and where it is pleaded that the testator was not of sound mind, memory, and understanding, particulars of any specific instances of delusion must be delivered before the case is set down for trial; except by leave of the court or judge, no evidence can be given of any other instances at the trial (*h*).

Defence must state substance of case.

360. A party opposing a will may, with his defence, give notice to the party setting it up that he merely insists upon the will being proved in solemn form, and only intends to cross-examine the witnesses produced in support of the will; in such case he does not in any event render himself liable to pay the costs of

Notice with defence that party only insists upon proof in solemn form.

(*t*) *Bewsher* v. *Williams* (1861), 3 Sw. & Tr. 62. For failure to appear to a citation to take probate, see Court of Probate Act, 1858 (21 & 22 Vict. c. 95), s. 16; and see p. 144, *ante*.

(*a*) For the purposes of the Rules of the Supreme Court a probate action is defined to include actions and other matters relating to the grant or recall of probate or letters of administration other than common form business (R. S. C., Ord. 71, r. 1).

(*b*) R. S. C., Ord. 1, r. 1, and Ord. 2, r. 1. A writ only issues out of the principal registry (R. S. C., Ord. 5, r. 1).

(*c*) R. S. C., Ord. 3, r. 5.

(*d*) R. S. C., Ord. 5, r. 15. There must be a certificate of the registrar that a sufficient affidavit has been filed (Practice Masters' Rules, r. 5).

(*e*) R. S. C., Ord. 11, r. 3.

(*f*) See title PRACTICE AND PROCEDURE. An appearance for an infant can only be entered by a guardian assigned to him by the order of a registrar (Probate Rules (Contentious), 1862, r. 74).

(*g*) R. S. C., Ord. 20, r. 9.

(*h*) R. S. C., Ord. 19, r. 25A.

SECT. 4. Probate in Solemn Form.

the other side, unless the judge is of opinion that there was no reasonable ground for opposing the will (*i*). It does not at all follow because a defendant fails that there was no reasonable ground (*k*). A person seeking to call in and obtain revocation of a probate has no right to give such a notice (*l*).

Affidavit of scripts.

361. Both the plaintiff and the defendant must, within eight days of the entry of an appearance by the defendant, file affidavits of scripts, whether or not they have any script in their possession (*m*). No party may without leave inspect the affidavit or the scripts annexed thereto of any other party before he has filed his own affidavit (*n*).

Default of defence.

362. In probate actions, if a defendant make default in filing and delivering a defence, the action may proceed notwithstanding such default (*o*).

Citations and interventions.

363. A person may be cited to see proceedings in a probate action, the practice as to citations being still in force (*p*). Any person not named in the writ may intervene and appear in the action on filing an affidavit showing how he is interested in the testator's estate (*q*). The possibility of an interest is sufficient to entitle a person to become a party to the proceedings (*r*). A creditor who has obtained administration is entitled to dispute the validity of a will (*s*).

Where will affects realty.

364. Where a will in dispute affects real estate, the heir-at-law, devisees, and other persons having, or pretending, interest in the real estate affected by the will must be cited to see proceedings, or otherwise summoned in like manner as the next of kin (*a*). The court will not give leave to cite the assign of the heir-at-law (*b*). The court has power to appoint a receiver of the real estate before the heir has been brought before the court (*c*).

Persons to be cited.

Trial with or without jury.

365. The question whether the action is to be tried with or without a jury is governed by the general rules of the Supreme Court regulating such questions (*d*).

(*i*) R. S. C., Ord. 21, r. 18.

(*k*) *Davies* v. *Jones*, [1899] P. 161. In *Spicer* v. *Spicer*, [1899] P. 38, and *Perry* v. *Dixon* (1899), 80 L. T. 297, the defendants were ordered to pay the costs.

(*l*) *Tomalin* v. *Smart*, [1904] P. 141.

(*m*) Probate Rules (Contentious Business), 1862, r. 30. The term "script" comprises all papers and writings being or purporting to be of a testamentary nature, and all instructions for and drafts of any testamentary dispositions.

(*n*) *Ibid.*, r. 32.

(*o*) R. S. C., Ord. 27, r. 10. It is not necessary to file pleadings; see Tristram & Coote, Probate Practice, 14th ed., p. 363.

(*p*) *Kennaway* v. *Kennaway* (1876), 1 P. D. 148; see, too, R. S. C., Ord. 16, r. 10, preserving the rules as to parties used in the Court of Probate.

(*q*) R. S. C., Ord. 12, r. 23.

(*r*) *Kipping* v. *Ash* (1845), 1 Rob. Eccl. 270; *Crispin* v. *Doglioni* (1860), 2 Sw. & Tr. 17.

(*s*) *Dabbs* v. *Chisman*, *Jennens* v. *Beauchamp* (1810), 1 Phillim. 154, 160.

(*a*) Court of Probate Act, 1847 (20 & 21 Vict. c. 77), s. 61.

(*b*) *Jones* v. *Jones* (1882), 7 P. D. 66.

(*c*) *In the Goods of Messiter-Terry*, *Mathew* v. *Tooze* (1908), 24 T. L. R. 465.

(*d*) *Burgoine* v. *Moordaff* (1883), 8 P. D. 205, C. A.; see titles JURIES;

Effect of judgment.

366. A judgment in a probate action is binding not only on the parties to the action, but on every person who has had notice of the action, and has a right to intervene (*e*); where, upon the facts then known, he has no such right, he is not bound if other facts subsequently come to light (*f*); nor will he be bound by a compromise of the action entered into without notice to him (*g*).

Where infants interested.

367. The court can approve of a compromise on behalf of infants, but it has no power to force one upon them against the opinion of their advisers (*h*), and it will only approve of such a compromise when the infants are parties to proceedings commenced by writ of summons (*i*), and on proper evidence that the compromise is for their benefit.

Jurisdiction to stay frivolous proceedings.

368. The Probate Division has, apart from any rule of the Supreme Court (*k*), an inherent jurisdiction, in common with other courts, to stay proceedings which are frivolous and vexatious and an abuse of the process of the court (*l*).

SUB-SECT. 3.—*Grounds upon which Probate of a Will may be opposed.*

(i.) *Want of due Execution.*

Evidence of attesting witness.

369. Probate of a will may be opposed on the ground that the statutory requirements as to due execution have not been complied with (*m*). The evidence of one of the attesting witnesses, if he depose to the due execution, is sufficient (*n*); if he fail to prove the due execution, the other attesting witness must be called, although he may be an adverse witness (*o*). The party calling an attesting witness is entitled to cross-examine him (*p*). If neither of the attesting witnesses can be found, any person who in fact saw the execution may be called, and the court is entitled to read the affidavit of one of the attesting witnesses previously made upon the application for a grant in common form (*q*).

PRACTICE AND PROCEDURE. The Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 35, which gave the heir-at-law the right to apply for a trial by a jury, has been repealed, see Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19).

(*e*) *Newell* v. *Weeks* (1814), 2 Phillim. 224; *Ratcliffe* v. *Barnes* (1862), 2 Sw. & Tr. 486; *Mecredy* v. *Brown*, [1906] 2 I. R. 437, C. A.

(*f*) *Young* v. *Holloway*, [1895] P. 87.

(*g*) *Wytcherley* v. *Andrews* (1871), L. R. 2 P. & D. 327; *Ritchie* v. *Malcolm*, [1902] 2 I. R. 403.

(*h*) *Re Birchall*, *Wilson* v. *Birchall* (1880), 16 Ch. D. 41, C. A. See, further, titles FAMILY ARRANGEMENTS, p. 540, *post*; INFANTS AND CHILDREN.

(*i*) *Norman* v. *Strains* (1880), 6 P. D. 219.

(*k*) The order in question is R. S. C., Ord. 25, r. 4; see also title PRACTICE AND PROCEDURE.

(*l*) *Willis* v. *Beauchamp* (*Earl*) (1886), 11 P. D. 59, C. A.

(*m*) For the statutory requirements, see title WILLS; see also Encyclopædia of Forms and Precedents, Vol. XII., p. 72, and Vol. XV., p. 358.

(*n*) *Belbin* v. *Skeats* (1858), 1 Sw. & Tr. 148.

(*o*) *Coles* v. *Coles and Brown* (1866), L. R. 1 P. & D. 70.

(*p*) *Jones* v. *Jones* (1908), 24 T. L. R. 839.

(*q*) *Hayes* v. *Willis* (1906), 75 L. J. (P.) 86.

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(ii.) *Want of Competent Understanding.*

Presumption in favour of competent understanding.

370. A will rational on the face of it, and shown to have been signed and attested in the manner prescribed by law, is presumed, in the absence of any evidence to the contrary, to have been made by a person of competent understanding (*r*); but when the capacity of a testator is questioned, the burden of proof rests upon those who set up the will (*s*).

Evidence of unsoundness of mind.

The question of unsoundness of mind is one of degree (*t*). The mere fact that a testator was eccentric (*a*), or was subject to one or more delusions, is not of itself sufficient to destroy the validity of his will (*b*); it must be shown that the delusion had, or was calculated to have, an influence on his testamentary dispositions (*c*). A person who has not the capacity to comprehend the extent of his property and the nature of the claims of people whom he is excluding from participation has not a sound disposing mind (*d*). But a display of unkind or even unnatural feeling towards a particular person is not of itself sufficient to prove partial insanity; such insanity can only be proved by making out a case of antipathy clearly resolvable into mental perversion (*e*).

(iii.) *Want of Knowledge and Approval.*

Knowledge and approval essential to validity of will.

371. Probate of a will may also be opposed on the ground of the testator's want of knowledge and approval. It is essential to the validity of a will that the testator should have known and approved of its contents at the time of its execution (*f*). The burden of proving these facts is assumed by everyone who propounds a will; but the burden is satisfied *primâ facie* in the case of a competent testator by proving that he executed the will (*g*).

Presumption in favour of knowledge and approval.

372. In the absence of fraud it may be laid down as a general rule that the fact that his will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, is conclusive evidence

(*r*) *Symes* v. *Green* (1859), 1 Sw. & Tr. 401, *per* Sir C. CRESSWELL, at p. 402. As to persons *non compos mentis*, generally, see title LUNATICS AND PERSONS OF UNSOUND MIND.

(*s*) *Smee* v. *Smee* (1879), 5 P. D. 84. As to incapacity of testator of unsound mind, see titles LUNATICS AND PERSONS OF UNSOUND MIND; WILLS.

(*t*) *Burdett* v. *Thompson* (1873), L. R. 3 P. & D. 72, n.; *Sutton* v. *Sadler* (1857), 3 C. B. (N. S.), 87.

(*a*) *Pilkington* v. *Gray*, [1899] A. C. 401, 407, P. C.

(*b*) *Banks* v. *Goodfellow* (1870), L. R. 5 Q. B. 549 (qualifying the doctrine laid down in this respect by *Waring* v. *Waring* (1848), 6 Moo. P. C. C. 341, and *Smith* v. *Tebbitt* (1867), L. R. 1 P. & D. 398); *Murfett* v. *Smith* (1887), 12 P. D. 116.

(*c*) *Banks* v. *Goodfellow*, *supra*; *Boughton* v. *Knight* (1873), L. R. 3 P. & D. 64; *Smee* v. *Smee* (1879), 5 P. D. 84.

(*d*) *Harwood* v. *Baker* (1840), 3 Moo. P. C. C. 282, *per* ERSKINE, J., at p. 290.

(*e*) *Dew* v. *Clark* (1822), 1 Add. 279; (1826) 3 Add. 79; *Hope* v. *Campbell*, [1899] A. C. 1; and see, further, title LUNATICS AND PERSONS OF UNSOUND MIND.

(*f*) *Hastilow* v. *Stobie* (1865), L. R. 1 P. & D. 64.

(*g*) *Cleare* v. *Cleare* (1869), L. R. 1 P. & D. 655.

that he approved of, as well as knew, the contents thereof (*h*). There is, however, no unyielding rule of law that a testator who executes his will after having had it read to him must be held to have known, and approved of, the contents; it is open to the tribunal before whom the question arises to find as a fact that the will has not been read to him in such a way as to convey to his mind a due appreciation of its contents (*i*).

What can be excepted out of grant.

373. Where the testator is shown to have known and approved of a particular word or clause, it cannot be excepted out of the grant, even though it produce an effect contrary to his real intention, or though it may have been inserted by a slip on the part of the draughtsman (*j*). The court will, however, except out of the grant a word or clause which has been introduced into the will *per incuriam*, without the knowledge or instructions of the testator (*k*), and will refuse probate of a document executed by mistake (*l*).

(iv.) *Undue Influence.*

What constitutes undue influence.

374. A will may be set aside on the ground of its having been obtained by undue influence. The party alleging undue influence has the right to begin (*m*). To constitute undue influence in the eye of the law there must be coercion (*n*); pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made (*o*).

Presumption.

375. The mere proof of the existence of the relation of parent and child, husband and wife, doctor and patient, solicitor and client, confessor and penitent, guardian and ward, tutor and pupil, does not raise a presumption of undue influence sufficient to vitiate a gift by will (*p*).

(v.) *Fraud.*

Clauses fraudulently introduced excepted out of grant.

376. Where a clause can be shown to have been introduced into a will by means of fraud practised upon the testator (*q*), or by

(*h*) *Guardhouse* v. *Blackburn* (1866), L. R. 1 P. & D. 109. See the fifth rule laid down by Sir J. P. WILDE, at p. 116.

(*i*) *Fulton* v. *Andrew* (1875), L. R. 7 H. L. 448, commenting upon *Atter* v. *Atkinson* (1869), L. R. 1 P. & D. 665; *Garnett-Botfield* v. *Garnett-Botfield*, [1901] P. 335; see, too, *Beamish* v. *Beamish*, [1894] 1 I. R. 7.

(*j*) *Harter* v. *Harter* (1873), L. R. 3 P. & D. 11; *Collins* v. *Elstone*, [1893] P. 1; *Rhodes* v. *Rhodes* (1882), 7 App. Cas. 192, P. C.

(*k*) *In the Goods of Oswald* (1874), L. R. 3 P. & D. 162; *Morrell* v. *Morrell* (1882), 7 P. D. 68; *In the Goods of Moore*, [1892] P. 378; *In the Goods of Boehm* (*Sir J. E.*), [1891] P. 247.

(*l*) *In the Estate of Meyer*, [1908] P. 353. As to mistake, generally, see title MISTAKE.

(*m*) *Hutley* v. *Grimstone* (1879), 5 P. D. 24. See also titles MISREPRESENTATION AND FRAUD; WILLS.

(*n*) *Wingrove* v. *Wingrove* (1885), 11 P. D. 81.

(*o*) *Hall* v. *Hall* (1868), L. R. 1 P. & D. 481, *per* Sir J. P. WILDE, at p. 482; see, too, *Mountain* v. *Bennet* (1787), 1 Cox, Eq. Cas. 353; *Boyse* v. *Rossborough* (1857), 6 H. L. Cas. 2, 51; *Baudains* v. *Richardson*, [1906] A. C. 169, P. C.

(*p*) *Parfitt* v. *Lawless* (1872), L. R. 2 P. & D. 462.

(*q*) *Guardhouse* v. *Blackburn*, *supra*; see the fourth rule laid down by Sir J. P. WILDE, at p. 116.

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forgery after his death (*r*), it is excepted out of the grant. In such a case the court has jurisdiction to declare the executors trustees for the person deprived of benefit by the fraud (*s*).

Will prepared by a person in his own favour.

377. Where a person has prepared a will in his own favour, it is his duty to bring home to the mind of the testator the effect of his testamentary act, and failure to do so may amount to fraud (*t*). It is a circumstance that ought generally to excite suspicion, and call for vigilant and jealous examination of the evidence in support of the instrument (*a*). It rests upon the person who has procured a will, under which he takes a large benefit, to show that the will does really express the mind and intention of the testator (*b*). The mere circumstance that the person who prepared a will takes an interest under it does not vitiate the will (*c*).

(vi.) *Instrument not intended to operate as a Will.*

Instrument not intended to operate as a will.

378. Probate of a document, though on the face of it testamentary and duly executed, may be refused, if the author had no real intention that it should operate as a will (*d*).

(vii.) *Revocation.*

Revoked will.

379. A will may be opposed on the ground that it has been revoked (*e*).

SUB-SECT. 4.—*Costs of Probate Action.*

Costs generally.

380. Costs are in the discretion of the court (*f*); where an action is tried with a jury the costs follow the event, unless the court for good cause otherwise orders (*g*). In the exercise of its discretion the court is guided by the principles which were laid down by the old courts of probate (*h*).

Costs of successful parties.

381. An executor who proves a will in solemn form, whether he has done so of his own motion or has been put to proof by parties interested, is entitled to retain his costs out of the estate. A beneficiary who successfully propounds a will in solemn form is also entitled to his costs and expenses out of the estate (*i*) on the same scale as an executor (*k*). A person entitled under an

(*r*) *Plume* v. *Beale* (1717), 1 P. Wms. 388. See also title EQUITY, Vol. XIII., p. 13.

(*s*) *Betts* v. *Doughty* (1879), 5 P. D. 26.

(*t*) *Fulton* v. *Andrew* (1875), L. R. 7 H. L. 448, *per* Lord CAIRNS, L.C., at p. 463.

(*a*) *Barry* v. *Butlin* (1838), 2 Moo. P. C. C. 480, *per* PARKE, B., at p. 482; *Tyrrell* v. *Painton*, [1894] P. 151, C. A., *per* LINDLEY, L.J., at p. 157.

(*b*) *Brown* v. *Fisher* (1890), 63 L. T. 465; *Finny* v. *Govett* (1909), 25 T. L. R. 186, C. A.

(*c*) *Low* v. *Guthrie*, [1909] A. C. 278, 283.

(*d*) *Nichols* v. *Nichols* (1814), 2 Phillim. 180; see, too, *Ferguson-Davie* v. *Ferguson-Davie* (1890), 15 P. D. 109.

(*e*) As to the requisites for revocation, see title WILLS.

(*f*) Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5.

(*g*) R. S. C., Ord. 65, r. 1.

(*h*) *Twist* v. *Tye*, [1902] P. 92; *Page* v. *Williamson* (1902), 87 L. T. 146.

(*i*) *Sutton* v. *Drax* (1815), 2 Phillim. 323.

(*k*) *Wilkinson* v. *Corfield* (1881), 6. P. D. 27.

intestacy (*l*) or under a prior will who successfully contests the validity of a later will is also entitled to his costs out of the estate, so far as the unsuccessful party fails to pay them. Where there is sufficient divergence of interest between defendants, they are justified in appearing by separate counsel (*m*).

Costs of unsuccessful parties.

The executor.

382. An executor, being *primâ facie* justified in propounding a will, is generally entitled to his costs out of the estate, even if he be unsuccessful (*n*). He may, however, by his conduct not only disentitle himself to costs, but render himself liable to pay the costs of the successful parties, especially if he himself takes a large benefit under the will which he seeks to propound (*o*). With regard to other unsuccessful parties two general rules have been laid down (*p*): (1) Where the cause of litigation takes its origin in the fault of the testator, or of those interested in the residuary estate (*q*), the costs of the unsuccessful party are allowed out of the estate, and (2) the unsuccessful party will not be ordered to pay costs if there be a sufficient and reasonable ground, looking to his knowledge and means of knowledge, to question the execution of the will or the capacity of the testator, or to make a charge of undue influence or fraud (*r*). A party unsuccessfully seeking to revoke a will must pay the costs, unless he has reasonable grounds for raising the question (*s*). The costs of a party who gives notice that he merely intends to cross-examine the witnesses produced in support of the will have been previously dealt with (*t*).

Other unsuccessful parties.

Interveners.

383. The rights and liabilities of interveners with regard to costs depend upon the circumstances of each case. A summons by a married woman for leave to intervene amounts to the institution of proceedings by her, so as to render her separate property liable to be condemned in costs (*a*).

The court has power to order a party who has been cited, but has not appeared, to pay costs (*b*).

Payment of costs out of certain portions of estate.

384. Where an order is made in a probate action that costs are to be paid out of the estate, the judge making the order may

(*l*) *Critchell* v. *Critchell* (1863), 3 Sw. & Tr. 41.

(*m*) *Bagshaw* v. *Pimm*, [1900] P. 148, C. A.

(*n*) *Boughton* v. *Knight* (1873), L. R. 3 P. & D. 64.

(*o*) See *Saph* v. *Atkinson* (1822), 1 Add. 162; *Dodge* v. *Meech* (1828), 1 Hag. Ecc. 612; *Marsh* v. *Tyrrell* (1828), 2 Hag. Ecc. 84; *Baker* v. *Batt* (1838), 2 Moo. P. C. C. 317.

(*p*) *Mitchell* v. *Gard* (1863), 3 Sw. & Tr. 275.

(*q*) See *Smith* v. *Smith* (1865), 4 Sw. & Tr. 3; *Orton* v. *Smith* (1873), L. R. 3 P. & D. 23.

(*r*) For instances, see *Ferrey* v. *King* (1861), 3 Sw. & Tr. 51; *Bramley* v. *Bramley* (1864), 3 Sw. & Tr. 430; *Tippett* v. *Tippett* (1865), L. R. 1 P. & D. 54; *Aylwin* v. *Aylwin*, [1902] P. 203.

(*s*) *Spiers* v. *English*, [1907] P. 122, commenting on *Wilson* v. *Bassil*, [1903] P. 239; *Levy* v. *Leo* (1909), 25 T. L. R. 717; *Oldcorn* v. *Tenniswood* (1909), 25 T. L. R. 825.

(*t*) See p. 175, *ante*.

(*a*) *Crickitt* v. *Crickitt*, [1902] P. 177, C. A. As to the liability of married women to pay costs, see title HUSBAND AND WIFE.

(*b*) *King* v. *Gillard* (1867), L. R. 1 P. & D. 539. As to taxation of costs, generally, see title SOLICITORS.

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direct out of what portion or portions of the estate they are to be paid (*c*). Where they are directed generally to be paid out of the estate, they are payable out of the entirety of the estate in due order of administration (*d*). Where the order of the Probate Division for payment of costs is not made until after an order has been made in Chancery for the administration of the estate, the order of the Probate Division can only operate upon what remains after payment of the costs of administration (*e*).

SECT. 5.—*General Grants of Administration.*

SUB-SECT. 1.—*In General.*

Foundation of jurisdiction is property in England.

385. Where a person dies intestate (*f*) representation to his estate is obtained by means of a grant of letters of administration (*g*). The foundation of the jurisdiction of the court to make a grant is that there is property belonging to the intestate within its jurisdiction to be distributed (*h*); it is accordingly essential to show that there is such property in this country (*i*).

Grant to foreign representative.

386. Where the intestate dies domiciled abroad, the practice of the English court is to make a grant to the person recognised by the proper court of the country of domicil, unless such person is by the law of this country personally disqualified from taking a grant, for instance a minor (*j*). Where the person who has obtained the foreign grant is an agent for the party entitled thereto, the English court before making a grant to the agent must be satisfied that the agent has authority to make the application in England (*k*). The English grant follows the foreign grant, but where the latter is limited in point of time it is the better practice to make an unlimited grant here (*l*).

English grant follows foreign grant.

Persons having prior rights to administer.

387. There are certain persons recognised by law as being entitled to administer in priority to others (*m*), and in the absence

(*c*) R. S. C., Ord. 65, r. 14D; see *Dean* v. *Bulmer*, [1905] P. 1; *Harrington* v. *Butt*, [1905] P. 3, n.

(*d*) *Re Vickerstaff*, *Vickerstaff* v. *Chadwick*, [1906] 1 Ch. 762. The ground upon which *Re Shaw*, *Bridges* v. *Shaw*, [1894] 3 Ch. 615, was based has disappeared.

(*e*) *Re Mayhew*, *Bowles* v. *Mayhew* (1877), 5 Ch. D. 596, C. A.; *Major* v. *Major* (1854), 2 Drew. 281.

(*f*) For definitions of intestacy, see title DESCENT AND DISTRIBUTION, Vol. XI., p. 2.

(*g*) Where there is an alleged will, and the parties interested thereunder have been cited to appear and propound the same, but fail to do so, administration is granted as upon an intestacy (*Morton* v. *Thorpe* (1863), 3 Sw. & Tr. 179; *In the Goods of Quick*, *Quick* v. *Quick*, [1899] P. 187; *In the Goods of Bootle*, *Heaton* v. *Whalley* (1901), 84 L. T. 570; see, too, *In the Goods of Dennis*, [1899] P. 191, following *Crosby* v. *Noton* (1867), 36 L. J. (P. & M.) 55).

(*h*) *In the Goods of Tucker* (1864), 3 Sw. & Tr. 585.

(*i*) *Evans* v. *Burrell* (1859), 28 L. J. (P. & M.) 82; *In the Goods of Fittock* (1863), 32 L. J. (P. M. & A.) 157.

(*j*) See p. 164, *ante*.

(*k*) *In the Goods of Weaver* (1867), 36 L. J. (P. & M.) 41.

(*l*) *In the Estate of Levy*, [1908] P. 108.

(*m*) See stat. (1357) 31 Edw. 3, stat. 1, c. 11; stat. (1529) 21 Hen. 8, c. 5, s. 2; Statute of Frauds (29 Car. 2, c. 3), s. 24; Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 2 (4).

of any grounds for the exercise of its discretionary power (*n*) the court has regard to these rights in making a grant.

SUB-SECT. 2.—*The Widower.*

388. The husband has a paramount title to administer his wife's personal estate (*o*), but he is passed over where the marriage was in fact void (*p*), or where the wife has obtained a divorce (*q*). Where the wife has obtained a judicial separation (*r*) or a protection order (*s*), administration of such property as she acquired after the separation or protection order is granted to her next of kin without citing the husband. Citation of the husband is also dispensed with after a long period of desertion (*t*), though justifying security to the value of his interest in the estate may be required (*u*). Where by agreement between husband and wife the husband is excluded from all interest in her property (*a*), or where he wife's property is settled under an instrument whereby it reverts to her family on her death (*b*), administration goes to her next of kin. The husband's right is not one which vests in his trustee in bankruptcy, though the court has under its discretionary jurisdiction power to make a grant to the trustee (*c*). Where the husband dies without having taken out administration to his wife's personal estate, the grant goes to his representatives (*d*) after representation to his estate has been obtained (*e*).

Husband has paramount title.

When husband may be passed over.

Husband's title devolves upon his representative.

389. Where the wife dies possessed of real and personal estate, the court, being required to have regard, in granting letters of administration, to the rights and interests of the persons interested in the real estate (*f*), may accordingly under its discretionary

Right to administer where wife possessed of real and personal estate.

(*n*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 73.

(*o*) The right is founded on stat. (1357) 31 Edw. 3, stat. 1, c. 11, on the ground of the husband being "the next and most lawful friend" of his wife, and is confirmed by the Statute of Frauds (29 Car. 2, c. 3), s. 24.

(*p*) *Browning* v. *Reane* (1812), 2 Phillim. 69; *In the Goods of Hay* (1865), L. R. 1 P. & D. 51.

(*q*) *In the Estate of Wallas*, [1905] P. 326. As to effect of divorce and relationship of husband and wife generally, see title HUSBAND AND WIFE.

(*r*) *In the Goods of Jones* (1904), 74 L. J. (P.) 27.

(*s*) *In the Goods of Worman* (1859), 1 Sw. & Tr. 513; *In the Goods of Brighton* (1865), 34 L. J. (P. & M.) 55. For judicial separation and protection orders, see title HUSBAND AND WIFE.

(*t*) *In the Goods of Shoosmith*, [1894] P. 23; *In the Goods of Byrne* (1901), 84 L. T. 570.

(*u*) As to justifying and giving security, see p. 209, *post*.

(*a*) *Allen* v. *Humphrys* (1882), 8 P. D. 16; *In the Goods of Megson* (1899), 80 L. T. 295. The husband should be cited.

(*b*) *In the Goods of Pountney* (1832), 4 Hag. Ecc. 289. Where a daughter is entitled to a legacy under her father's will, and both she and her husband predecease the father, leaving issue, administration limited to the legacy goes to the daughter's next of kin without requiring the renunciation or citation of the husband's representative (*In the Goods of Councell* (1871), L. R. 2 P. & D. 214).

(*c*) *In the Goods of Turner* (1886), 12 P. D. 18; see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 145, 146, 157.

(*d*) *Fielder* v. *Hanger* (1832), 3 Hag. Ecc. 769.

(*e*) *Partington* v. *A.-G.* (1869), L. R. 4 H. L. 100; *In the Goods of Harding* (1872), L. R. 2 P. & D. 394.

(*f*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 2 (4).

SECT. 5. General Grants of Administration.

jurisdiction prefer the heir to the husband (*g*). Where husband and wife perish by the same calamity, in the absence of evidence that one died before the other, a grant in respect of the property of each is made to the next of kin of each (*h*).

SUB-SECT. 3.—*The Widow and Next of Kin.*

Widow and next of kin have equal right.

390. The widow and next of kin have an equal right to administer, the court having a discretion to make the grant to either or both, and, in the case of several next of kin, having a further discretion to accept any one or more of them (*i*). In practice the grant is made to the widow, unless sufficient cause is shown to the contrary (*k*).

Widow is preferred in practice.

Wife guilty of misconduct.

391. A woman who has been divorced (*l*), or who has been guilty of marital misconduct (*m*), is passed over. Where marital misconduct is alleged, the widow must be cited in order that she may have an opportunity of answering the allegation (*n*), unless the misconduct has already been proved in proceedings between her and her husband (*o*), or is beyond dispute (*p*); the case must be clearly made out (*q*). The fact that the widow has married again is no objection to her obtaining the grant (*r*).

Estate under £500.

392. Where an intestate husband's estate does not exceed £500 in value, and the widow becomes entitled to the whole of it (*s*) but dies without having obtained administration, a grant may be made to her representative without citing the husband's next of kin (*t*).

Committee.

The committee of a widow of unsound mind is entitled to the grant in preference to the next of kin of the husband (*a*).

SUB-SECT. 4.—*The Next of Kin Inter se.*

Rules of preference recognised as between next of kin *inter se*.

393. Where there are several next of kin certain rules of preference are recognised: (1) Lineal descendants are preferred to lineal

(*g*) *In the Goods of Ardern*, [1898] P. 147.

(*h*) *Satterthwaite* v. *Powell* (1838), 1 Curt. 705; *In the Goods of Wheeler* (1861), 31 L. J. (P. M. & A.) 40; *In the Goods of Alston*, [1892] P. 142; *In the Goods of Benyon*, [1901] P. 141; *In the Estates of Bruce* (*M.*) *and Bruce* (*G. M.*) (1910), 26 T. L. R. 381.

(*i*) Stat. (1529) 21 Hen. 8, c. 5, s. 2.

(*k*) *Stretch* v. *Pynn* (1752), 1 Lee, 30; *Webb* v. *Needham* (1823), 1 Add. 494.

(*l*) *In the Goods of Nares* (1888), 13 P. D. 35.

(*m*) *Conyers* v. *Kitson* (1831), 3 Hag. Ecc. 556; *In the Goods of Davies* (1840), 2 Curt. 628; *Chappell* v. *Chappell* (1843), 3 Curt. 429; *In the Goods of Anderson* (1864), 3 Sw. & Tr. 489; *In the Goods of Stevens*, [1898] P. 126.

(*n*) *In the Goods of Middleton* (1888), 14 P. D. 23.

(*o*) *In the Estate of Frost*, [1905] P. 140.

(*p*) *In the Goods of Stevens*, [1898] P. 126.

(*q*) *In the Goods of Cory* (1901), 84 L. T. 270. The fact that a decree of judicial separation has been pronounced against the widow on the ground of cruelty would not appear to amount to conduct of a nature disentitling her to the grant (*In the Goods of Ihler* (1873), L. R. 3 P. & D. 50).

(*r*) *Webb* v. *Needham* (1823), 1 Add. 494.

(*s*) See Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29); and, generally, title DESCENT AND DISTRIBUTION, Vol. XI., pp. 1 *et seq.*

(*t*) *In the Goods of Green* (1901), 84 L. T. 61.

(*a*) *Alford* v. *Alford* (1857), Dea. & Sw. 322. In *In the Goods of Dunn* (1846), 5 Notes of Cases, 97, the fact of the widow being of unsound mind was considered a ground for passing her over in favour of the next of kin.

ascendants (*b*); (2) the whole blood is preferred to the half-blood (*c*); (3) preference is given to the next of kin who has the support of the greatest interest (*d*); (4) preference is given to the one who comes first for the grant (*e*); (5) *cæteris paribus* males are preferred to females (*f*), but this rule yields to both (3) (*g*) and (4) (*h*); (6) primogeniture gives no right (*i*), but if things are precisely equal the fact of being the elder brother, or elder sister where there are no brothers (*k*), would incline the balance; (7) *cæteris paribus* a man accustomed to business is preferred (*l*).

Circumstances affecting right of preference.

394. The fact that one only of competing next of kin is of age gives him no preference. If minors have a greater interest, their guardian is entitled to the grant (*m*). The bankruptcy of one of two persons in equal degree of relationship is a reason for giving the preference to the other (*n*). The fact that one of the next of kin is also a creditor is a reason against his being preferred in a contest for administration (*o*). A person having an original interest is preferred to one with a derivative interest (*p*), but the court may make the grant to the latter, even without requiring the former to be cited (*q*). Where administration is applied for by one or some of the next of kin only, the registrar may require proof by affidavit or statutory declaration that notice of the application has been given to the other next of kin (*r*).

Joint administrations not favoured.

395. The practice of the court is against making a joint grant of administration (*s*); and a joint grant is never forced upon unwilling parties (*t*). The practice is not departed from except with the consent of all the other next of kin (*a*).

Interest causes.

396. Where there is a dispute as to who is in fact the next of kin of an intestate, the question is tried in an action known as an interest cause. The practice in such actions is similar to that in

(*b*) 2 Bl. Com. 504. A brother or sister would no doubt be preferred to a grandparent; see *Evelyn* v. *Evelyn* (1754), 3 Atk. 762, a decision on the question of inheritance. As to rules for ascertaining next of kin for purposes of distribution, see title DESCENT AND DISTRIBUTION, Vol. XI., p. 16.

(*c*) *Mercer* v. *Morland* (1758), 2 Lee, 499; *Stratton* v. *Linton* (1861), 31 L. J. (P. M. & A.) 48.

(*d*) *Elwes* v. *Elwes* (1728), 2 Lee, 573; *Budd* v. *Silver* (1813), 2 Phillim. 115.

(*e*) *Cordeux* v. *Trasler* (1865), 34 L. J. (P. M. & A.) 127.

(*f*) *Chittenden* v. *Knight* (1758), 2 Lee, 559.

(*g*) *Iredale* v. *Ford and Bramworth* (1859), 1 Sw. & Tr. 305.

(*h*) *Cordeux* v. *Trasler*, *supra*.

(*i*) *Warwick* (*Earl*) v. *Greville* (1809), 1 Phillim. 123, 125.

(*k*) *Coppin* v. *Dillon* (1833), 4 Hag. Ecc. 361, 376.

(*l*) *Williams* v. *Wilkins* (1812), 2 Phillim. 100.

(*m*) *Cartright's Case* (1679), Freem. (K. B.) 258.

(*n*) *Bell* v. *Timiswood* (1812), 2 Phillim. 22.

(*o*) *Webb* v. *Needham* (1823), 1 Add. 494.

(*p*) *In the Goods of Carr* (1867), L. R. 1 P. & D. 291, *per* Sir J. P. WILDE, at p. 292.

(*q*) *In the Goods of Kinchella*, [1894] P. 264.

(*r*) Probate Rules (Non-Contentious), 1862, r. 28.

(*s*) *Warwick* (*Earl*) *v. Greville* (1809), 1 Phillim. 123, 126.

(*t*) *Bell* v. *Timiswood*, *supra*.

(*a*) *In the Goods of Newbold* (1866), L. R. 1 P. & D. 285. The next of kin to consent must be of age, or nearly so (*In the Goods of Dickinson*, [1891] P. 292).

SECT. 5. General Grants of Administration.

actions for proving a will in solemn form. Each party is at liberty to deny the interest of the other, and both parties may, with the permission of the judge, adduce proof on one and the same trial of their interests respectively (*b*). The pleading of each party must show on the face of it that no other person exists having a prior right to that of the claimant (*c*).

SUB-SECT. 5.—*The Heir-at-Law.*

Heir-at-law has an equal right with the next of kin.

397. Where a person dies possessed of real estate, the court, in granting probate or letters of administration, has regard to the rights and interests of persons interested in the real estate, and the heir-at-law of an intestate, if not one of the next of kin, is to be equally entitled to the grant with the next of kin (*d*).

When notice must be given to the next of kin.

398. Where the title of the person applying for administration as heir-at-law is clear, and there is no personal estate, a grant may be made to him without citing the next of kin; where the title of the applicant is doubtful, or the amount of the personalty is large as compared with the realty, the next of kin must be cited (*e*).

Conflict between the husband and heir-at-law.

399. The court may in special circumstances pass over the husband of a woman dying intestate in favour of the heir (*f*), and in a case where the personal estate was of trifling value in comparison with the realty, the court refused to make a general grant to the representative of the husband without citing the heir-at-law (*g*), but the court can make a grant under its discretionary power without citing the heir-at-law (*h*).

SUB-SECT. 6.—*The Crown.*

Right of the Crown.

400. Where a person dies intestate, unmarried, and without kindred, administration to his personal estate is granted to the nominee of the Crown (*i*). In case of partial intestacy only, the nominee of the Crown is not entitled to a general grant, but to a grant limited to the property undisposed of by the will (*k*).

Grant to the Treasury Solicitor.

Where the Crown has by warrant under the royal sign manual nominated the Treasury Solicitor for the purpose of taking a grant, the grant is made to him, by his official name, for the use of the Crown, or, if so provided by the warrant, to some person nominated in that behalf by the Treasury Solicitor (*l*). The royal warrant may nominate the Treasury Solicitor either

(*b*) Probate Rules (Contentious), 1862, r. 61.
(*c*) *Ibid.*, r. 62.
(*d*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 2 (4).
(*e*) *In the Goods of Barnett*, [1898] P. 145.
(*f*) *In the Goods of Ardern*, [1898] P. 147; see p. 184, *ante*.
(*g*) *In the Goods of Roberts*, [1898] P. 149.
(*h*) *In the Goods of Blenkinsop* (1901), 49 W. R. 336.
(*i*) *Stote* v. *Tyndall* (*King's Proctor*) (1757), 2 Lee, 394. As to administration of convicts' estates, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 428 *et seq.* As to trust and mortgage estates vested in a convict, see also p. 235, *post*.
(*k*) *In the Goods of Rhoades* (1866), L. R. 1 P. & D. 119.
(*l*) Treasury Solicitor Act, 1876 (39 & 40 Vict. c. 18), s. 2. As to powers of Treasury Solicitor, see CONSTITUTIONAL LAW, Vol. VII., p. 78.

in any particular case or class of cases, or in all cases; it may limit the period of the nomination, and may authorise the Treasury Solicitor to nominate some other person to take out the administration in any particular case or class of cases (*m*). The letters of administration, together with all their incidents, vest in the Treasury Solicitor for the time being without further grant (*n*). The court has power to revoke the grant (*o*).

No bond required.

401. Although the Treasury Solicitor does not give the bond which a private individual is by law required to give, he is subject to the liabilities and duties imposed by a bond (*p*). In place of an inventory he files a declaration of the intestate's estate, and an order is required to enable the grant to issue.

Death of Sovereign before grant.

402. Upon the death of the Sovereign before he has obtained a grant or completed the administration, a fresh grant or a grant *de bonis non*, as the case may be, is made to the person nominated in that behalf by the deceased Sovereign's executors (*q*).

Actions against nominee of Crown.

Where administration has been granted to a nominee of the Crown, proceedings by or against the nominee with regard to the intestate's personal estate are carried on in the same manner, and are subject to the same rules of law and equity (including the rules of limitation under the Statutes of Limitation or otherwise) as if the administration had been granted to the nominee as one of the next of kin (*r*).

Accordingly if the nominee of the Crown hand over assets of the intestate to the Crown, and next of kin subsequently establish their claim in time, he must account for the assets so parted with, together with interest (*s*).

Grant to nominee of Crown confined to personalty.

403. The real estate of a person who dies intestate and without an heir escheats to the Crown (*a*); it does not vest in the administrator nominated by the Crown, and the grant is confined to the intestate's personal estate (*b*).

Grant to the Solicitor of the Duchy of Lancaster.

404. Where the intestate dies resident in the Duchy of Lancaster, the solicitor to the Duchy takes the grant. He gives no bond, but a declaration of the estate must be filed and a copy of the order made on motion for a grant must be lodged with the other papers at the registry.

(*m*) Treasury Solicitor Act, 1876 (39 & 40 Vict. c. 18), s. 2.

(*n*) *Ibid.*

(*o*) *Ibid.*

(*p*) *Ibid.* As to administrator's bond, see p. 206, *post*.

(*q*) *In the Goods of Best and Others*, [1901] P. 333. As to grants *de bonis non*, see p. 195, *post*.

(*r*) Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), s. 2. Proceedings by or against the Crown in respect of personal estate are to be governed by the ordinary Statutes of Limitation (*ibid.*, s. 3).

(*s*) *A.-G.* v. *Köhler* (1861), 9 H. L. Cas. 654; *Re Dewell, Edgar* v. *Reynolds* (1858), 4 Drew. 269. Where executors under an order in an action had paid certain personal estate to the Treasury Solicitor, who had not taken out administration, it was held that the Crown could not be charged with interest (*Re Gosman* (1881), 17 Ch. D. 771, C. A.).

(*a*) Copyholds do not escheat to the Crown unless the Crown is lord of the manor; see titles COPYHOLDS, Vol. VIII., p. 56: DESCENT AND DISTRIBUTION, Vol. XI. p. 23.

(*b*) *In the Goods of Hartley*, [1899] P. 40, where it was held that the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), does not bind the Crown.

SECT. 5. General Grants of Administration.

Where the intestate dies resident in Cornwall, a grant may be made to the nominee of the Prince of Wales in right of his Duchy of Cornwall; the nominee must give the usual bond, but sureties are dispensed with (*c*).

Grant to nominee of Prince of Wales.

When the holder of either Duchy vacates it, a fresh grant must be made to his successor in office.

In other respects the practice is similar to that in respect of grants to the Treasury Solicitor.

SUB-SECT. 7.—*The Public Trustee.*

Right of the Public Trustee.

405. The Public Trustee (*d*) is equally entitled with any other person or class of persons to a grant of administration, whether general, or with the will annexed, or limited as to time or otherwise (*e*); but as between the Public Trustee and the widower, widow, or next of kin the latter are to be preferred, unless for good cause shown to the contrary (*f*). The consent or citation of the Public Trustee is not to be required for the grant to any other person.

SUB-SECT. 8.—*The Creditors.*

Right of creditor depends on practice of the court.

406. If none of the persons entitled are willing to take out administration, a creditor of the intestate may do so (*g*): his right depends solely on the practice of the court (*h*), and accordingly, except in special circumstances (*i*), the grant is not made to him until all the persons entitled have been cited (*k*).

Conflict between creditor and person entitled to the grant.

407. A creditor has no right to oppose a grant to a person entitled to administer (*l*): but the court has a statutory power (*m*), where the estate is insolvent, to pass over the person entitled to the grant, and may grant administration to a creditor in preference to the person entitled thereto (*n*). The power will not be exercised where there is a doubt as to the insolvency of the estate (*o*), nor where the creditor cannot show that there are assets within the jurisdiction (*p*).

What constitutes a creditor for the purpose of a grant.

408. A creditor includes a secured creditor (*q*), and a surety who has paid off his deceased principal's debt (*r*). A creditor whose

(*c*) *Duchy of Cornwall Solicitor* v. *Canning* (1880), 5 P. D. 114; *In the Goods of Griffith* (1884), 9 P. D. 63.

(*d*) The Public Trustee is a corporation sole with perpetual succession and an official seal constituted by the Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 1 (2); see also title TRUSTS AND TRUSTEES.

(*e*) *Ibid.*, s. 15. By the Public Trustee Rules, 1907, r. 7 (1), the Public Trustee is authorised to accept probates or letters of administration of any kind.

(*f*) *Ibid.*, s. 6 (1).

(*g*) *Webb* v. *Needham* (1823), 1 Add. 494, 497.

(*h*) *Menzies* v. *Pulbrook* (1841), 2 Curt. 845, 850.

(*i*) *In the Goods of Atherton*, [1892] P. 104.

(*k*) *Brown* v. *Wildman* (1859), 28 L. J. (P. & M.) 54; see, too, *In the Goods of Druce* (1899), 81 L. T. 458.

(*l*) *Elme* v. *Da Costa* (1791), 1 Phillim. 173, 177; *Dabbs* v. *Chisman*, *Jennens* v. *Beauchamp* (1810), 1 Phillim. 155, 159.

(*m*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 73.

(*n*) *In the Goods of Farrands* (1876), 1 P. D. 439. As to the administration of insolvent estates, see p. 344, *post*. As to administration by the Official Receiver, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 104.

(*o*) *Hawke* v. *Wedderburne* (1868), L. R. 1 P. & D. 594.

(*p*) *In the Goods of Foy* (1898), 78 L. T. 49.

(*q*) *Roxburgh* v. *Lambert* (1829), 2 Hag. Ecc. 557; *In the Goods of Godfrey* (1861), 2 Sw. & Tr. 133; *In the Goods of Lowe* (1898), 78 L. T. 566.

(*r*) *Williams* v. *Jukes* (1864), 34 L. J. (P. M. & A.) 60.

debt is statute-barred may have a grant (*s*). It is not the practice to make a grant to a purchaser of a debt after the death (*t*), but a grant may be made to the trustee in bankruptcy of a creditor (*a*), or to the assignee of the trustee (*b*), or to the person who has paid the intestate's funeral expenses (*c*). Where an intestate has died without known relations, the creditor desirous of obtaining a grant must give notice of his intended application to the officer of the Crown (*d*), or to the solicitor of the Duchy of Lancaster or Cornwall, as the case may be.

When notice to the Crown required.

SUB-SECT. 9.—*Under the Discretionary Power of the Court.*

409. Where a person dies wholly intestate as to his personal estate, or without having appointed an executor willing and competent to take probate, or where the executor is at the time of the death resident out of the United Kingdom, the court may appoint, as administrator of his estate, some person other than the person by law entitled to a grant. The court has power to do so where it appears necessary or convenient by reason of the insolvency of the estate, or by reason of other special circumstances (*e*).

Statutory discretion of court.

410. No broad rule of law can be laid down as to what are special circumstances; each case must be decided upon its own merits (*f*). One object which the court keeps in view is the expeditious and economical administration of estates of deceased persons (*g*).

Special cumstances.

411. The mere fact that the next of kin are desirous that the court should make a grant to a nominee, who is a stranger to the estate, is not such a special circumstance (*h*). Where, however, there is a doubt as to the legitimacy of the persons claiming as next of kin, the court may give effect to an arrangement entered into between the parties that the grant shall be made to a stranger (*i*).

Grant to a stranger.

(*s*) *Coombs* v. *Coombs* (1866), L. R. 1 P. & D. 288.
(*t*) *Baynes* v. *Harrison* (1856) Dea. & Sw. 15.
(*a*) *In the Goods of Chune, Downward* v. *Dickinson* (1864), 3 Sw. & Tr. 564.
(*b*) *In the Goods of Burdett* (1876), 1 P. D. 427.
(*c*) *Newcombe* v. *Beloe* (1867), L. R. 1 P. & D. 314; *Fairland* v. *Percy* (1875), L. R. 3 P. & D. 217, 222.
(*d*) Probate Rules (Non-Contentious), 1862, r. 75; *In the Goods of Heerman* (1910), 27 T. L. R. 51; see p. 187, *ante*.
(*e*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 73; extended to real estate by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65); see *In the Goods of Barnett*, [1898] P. 145; *In the Goods of Wohglenuth* (1910), 54 Sol. Jo. 460. As to miscellaneous limited grants, see p. 203, *post*.
(*f*) *In the Goods of Chapman*, [1903] P. 192.
(*g*) *In the Goods of Grundy* (1868), L. R. 1 P. & D. 459.
(*h*) *In the Goods of Richardson* (1871), L. R. 2 P. & D. 244; *Teague* v. *Wharton* (1871), L. R. 2 P. & D. 360; *In the Goods of Hale* (1874), L. R. 3 P. & D. 207; *In the Goods of Brotherton*, [1901] P. 139.
(*i*) *In the Goods of Hopkins* (1875), L. R. 3 P. & D. 235; see, too, *In the Goods of Potter, Potter* v. *Potter*, [1899] P. 265, where the object in procuring the grant to a stranger was to put an end to litigation between the parties. In the following cases the court considered the circumstances sufficiently special to allow of the grant going to a stranger:—*In the Goods of Johnson* (1862), 2 Sw. & Tr. 595; *In the Goods of Jackson*, [1892] P. 257; *In the Goods of Trigg*, [1901] P. 42; *In the Goods of Potter, Potter* v. *Potter* (1900), 69 L. J. (P.) 53; *In the Goods of Barton*, [1898] P. 11.

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The court will also make a joint grant to the next of kin and a person not next of kin, but entitled in distribution (*k*).

Executor's nominee.

412. Where an executor is by reason of ill-health incapable of attending to business or of taking out probate, a grant of administration with the will annexed may be made to his nominee for his use and benefit (*l*).

Receiver.

The court may also make a grant to a receiver appointed by the Chancery Division to get in the intestate's estate (*m*).

Grant may be made without citing parties.

413. Before making a grant under its discretionary jurisdiction, the court usually requires citation of the parties having a claim to the grant; but it will in special circumstances make the grant without citation (*n*).

Person with prior right presumed dead.

414. Where the person who would, if living, be entitled to the grant has been missing for many years, the court may presume his death and make a grant upon the footing that such person is dead, without requiring him to be cited by advertisement (*o*).

Where the question of the person entitled to the grant depends upon the date of death of a person presumed to be deceased, the court solves the difficulty by making a grant under its discretionary powers (*p*). The court will not under such power make a grant to a person entitled in another character (*q*).

SUB-SECT. 10.—*Estates exempt from Administration.*

Estates exempt from administration:

(i.) Merchant seamen.

415. In certain cases representation to an intestate's estate is dispensed with.

The Board of Trade has power to pay over wages or property of a deceased merchant seaman or apprentice in their hands not exceeding in value £100 without representation being taken out (*r*).

(*k*) *In the Goods of Grundy* (1868), L. R. 1 P. & D. 459; *In the Goods of Walsh*, [1892] P. 230.

(*l*) *In the Estate of Davis*, [1906] P. 330; see, too, *In the Goods of Roberts* (1858), 1 Sw. & Tr. 64.

(*m*) *In the Goods of Mayer* (1873), L. R. 3 P. & D. 39; *In the Goods of Moore*, [1892] P. 145. As to receivers generally, see title RECEIVERS.

(*n*) For instances, see *In the Goods of Hagger* (1863), 3 Sw. & Tr. 65; *In the Goods of Burgess* (1863), 4 Sw. & Tr. 188; *In the Goods of Batterbee* (1889), 14 P. D. 39; *In the Goods of Webb* (1888), 13 P. D. 71; *In the Goods of See* (1879), 4 P. D. 86; *In the Goods of Atherton*, [1892] P. 104; *In the Goods of Crawshay*, [1893] P. 108; *In the Goods of Moffatt*, [1900] P. 152; *In the Goods of Campion*, [1900] P. 13; *In the Goods of Heerman* (1910), 27 T. L. R. 51.

(*o*) *In the Goods of Reed* (1874), 29 L. T. 932; *In the Goods of Callicott*, [1899] P. 189; *In the Goods of Love* (1901), 17 T. L. R. 721; *In the Goods of Chapman*, [1903] P. 192. It would appear to be sufficient for the applicant to swear to his belief that the absent party is dead (see *In the Goods of Chapman, supra*), though the practice is stated to be unsettled; see *In the Goods of Jackson* (1903), 87 L. T. 747, in which case *In the Goods of Reed, supra,* and *In the Goods of Pridham* (1889), 61 L. T. 302, were considered. Corroborative evidence of the death may be dispensed with (*In the Goods of Bowden* (1905), 21 T. L. R. 13).

(*p*) *In the Goods of Peck* (1860), 2 Sw. & Tr. 506; *In the Goods of Harling*, [1900] P. 59.

(*q*) *In the Goods of Fairweather* (1862), 2 Sw. & Tr. 588; *In the Goods of Smith* (1858), 27 L. J. (P. & M.) 105.

(*r*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 176. The above

The Commissioners of Chelsea Hospital have a similar power in respect of pensions and prize money not exceeding £50 of officers, soldiers, and others (*s*).

The Admiralty may dispense with representation when a sum not exceeding £100 stands in their books to the credit of a deceased officer, seaman or marine, or of a person employed in any of His Majesty's dockyards or other naval establishment, or in any of the civil departments of the navy, or of a person entitled to an allowance from the compassionate fund, or of a widow entitled to a pension on the establishment of the navy (*t*).

(ii.) Prize money and pensions.

(iii.) Naval assets.

416. A Secretary of State may dispense with representation where he controls personal estate not exceeding £100 in value of an officer, a soldier, or other person who has received remuneration out of money provided by Parliament for army services, or of the widow or relations of any such person (*a*). Special provisions also exist with regard to the disposal of the effects of officers and soldiers who die on service (*b*).

(iv.) Officers and soldiers.

Representation may be dispensed with on the death of a person to whom any sum not exceeding £100 is due from a public department in respect of any civil pay, superannuation, or other allowance, annuity, or gratuity (*c*).

(v.) Civil servants.

417. Representation is not necessary in the case of the intestacy of a debenture-holder, depositor, or other claimant entitled to any sum not exceeding £50 out of the funds of a loan society (*d*).

(vi.) Members of loan societies.

418. Where a member of or depositor with a registered building society, having in the funds thereof a sum not exceeding £50, dies intestate, the amount due to him may be paid to the person appearing to be entitled thereto without a grant of letters of administration (*e*). In the case of a deceased member of an unregistered building society the limit is £20 (*f*).

(vii.) Members of building societies.

power is extended by s. 150 of the Act to deposits in seamen's savings banks, for which see stat. (1856) 19 & 20 Vict. c. 41, s. 5, which is repealed and re-enacted by the last-quoted section of the first-named Act; see also, as to property of seamen generally, title SHIPPING AND NAVIGATION.

(*s*) Army Pensions Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 41), s. 5; Army Prize Money Act, 1832 (2 & 3 Will. 4, c. 53), s. 25, as repealed and replaced by the Army Prize (Shares of Deceased) Act, 1862 (27 & 28 Vict. c. 36), s. 3.

(*t*) Navy and Marines (Property of Deceased) Act, 1865 (28 & 29 Vict. c. 111), s. 6. The Act contains various provisions regulating the disposal by the Admiralty of an intestate's naval assets, for which see also the Order in Council of the 28th December, 1865. The provisions of the Act are extended by the Naval Pensions Act, 1884 (47 & 48 Vict. c. 44), to naval pensions and Greenwich Hospital pensions, gratuities, and allowances.

(*a*) Pensions and Yeomanry Pay Act, 1884 (47 & 48 Vict. c. 55), s. 4.

(*b*) See title ROYAL FORCES.

(*c*) Superannuation Act, 1887 (50 & 51 Vict. c. 67), s. 8.

(*d*) Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 11. As to loan societies, see also title LOAN SOCIETIES.

(*e*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 29.

(*f*) Stat. (1829) 10 Geo. 4, c. 56, s. 24; incorporated in stat. (1836) 6 & 7 Will. 4, c. 32, s. 4; see also title BUILDING SOCIETIES, Vol. III., pp. 324, note (*h*), 353, 369.

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Probate or other proof of title of the personal representative of a deceased depositor in a Trustee or the Post Office Savings Bank may be dispensed with, and the sum paid to the persons appearing by the prescribed regulations entitled to his personal estate (*g*), whether by nomination or otherwise (*h*).

(viii.) Depositors in Savings Bank.

(ix.) Members of trade unions, friendly societies, and industrial, and provident societies.

419. Members of trade unions (*i*), registered friendly societies (*k*), and registered industrial and provident societies (*l*) not under the age of sixteen years have a similar power of nominating persons to receive at their deaths money or property not exceeding £100 in value payable upon death (*m*). Where a member of a registered trade union (*n*), registered friendly society (*o*), or registered provident and industrial society (*p*) entitled from the funds of the union or society to a sum not exceeding £100 dies intestate and without having made an effective nomination, the union or society may, without letters of administration, distribute the sum among such persons as may appear to a majority of the directors, trustees, or committee, upon such evidence as they may deem satisfactory, entitled by law to receive the sum (*q*). If the total net sum payable upon a member's death exceeds £80, a receipt must be obtained, before any payment is made to a nominee or otherwise, from the Commissioners of Inland Revenue for the succession or legacy duty payable, or a letter or certificate stating that no such duty is payable (*r*).

In the case of an illegitimate member dying intestate, facilities exist for distributing his interest among the persons who would have been entitled thereto if he had been legitimate, or in default of such persons as the Treasury may direct (*s*).

(*g*) Savings Banks Act, 1887 (50 & 51 Vict. c. 40), s. 3 (1).

(*h*) As to nominations, see title BANKERS AND BANKING, Vol. I., pp. 578, 580.

(*i*) Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 10, as extended by the Provident Nominations and Small Intestacies Act, 1883 (46 & 47 Vict. c. 47), s. 3. The nominee of a member of a trade union cannot maintain an action against the trade union to recover the money to which he has become entitled under the nomination (*Crocker* v. *Knight*, [1892] 1 Q. B. 702, C. A.). As to trade unions generally, see title TRADE AND TRADE UNIONS.

(*k*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), ss. 56, 57. As to friendly societies generally, see title FRIENDLY SOCIETIES.

(*l*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), ss. 25, 26. As to industrial and provident societies generally, see title INDUSTRIAL AND PROVIDENT AND SIMILAR SOCIETIES.

(*m*) The person nominated must not be an officer or servant of the union or society, unless he or she be the husband, wife, father, mother, child, brother, sister, nephew, or niece of the nominator; see above Acts.

(*n*) Provident Nominations and Small Intestacies Act, 1883 (46 & 47 Vict. c. 47), s. 7.

(*o*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 58 (1).

(*p*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 27 (1).

(*q*) The power of distribution is entirely discretionary and the exercise thereof cannot be enforced by action (*Escritt* v. *Todmorden Co-operative Society*, [1896] 1 Q. B. 461).

(*r*) Provident Nominations and Small Intestacies Act, 1883 (46 & 47 Vict. c. 47), s. 10 (1); Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 58 (1); Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 27 (1).

(*s*) Provident Nominations and Small Intestacies Act, 1883 (46 & 47 Vict.

420. Where a policy of life assurance has been effected with an assurance company by a person who dies domiciled elsewhere than in the United Kingdom, the production of a grant of representation from a court in the United Kingdom is not necessary to establish the right to receive the policy money (*t*).

(x.) Holders of life policies domiciled abroad.

421. Where the estate of an intestate is entitled to a fund or to a share of a fund in court not exceeding £100, upon proof that no administration has been taken out to the deceased, and that his assets, inclusive of such fund or share, do not exceed £100, the court may direct the fund or share to be paid to the person who, being a widower, widow, child, father, mother, brother, or sister of the intestate, would be entitled to take out administration to his estate (*u*).

(xi.) Funds in court.

SUB-SECT. 11.—*Method of obtaining Administration.*

Practice.

422. The person applying for letters of administration must make and lodge at the proper quarter (*a*) the ordinary affidavit for the purposes of the Inland Revenue (*b*), and he must also take the oath for the due administration of the intestate's estate. The oath must be so worded as to clear off all persons having a prior right to the grant and show the applicant's title to administer as the only next of kin or one of the next of kin as the case may be, and it must appear on the grant how the prior interests have been cleared off. The oath must also contain a description of the intestate and state the gross amount of the estate. In all administrations of a special character the recitals in the oath and in the letters of administration must be framed in accordance with the facts of the case (*c*). A bond must be given in every case for the due administration of the estate by the applicant except by the solicitor to the Treasury or the Duchy of Lancaster or by the Public Trustee (*d*).

Inland Revenue affidavit.

Oath of administrator.

c. 47), s. 8; Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 58 (2); Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 27 (2). Under the last-mentioned Act there is no power to distribute amongst the persons who would have been entitled if the member had been legitimate; the distribution must be at the direction of the Treasury.

(*t*) Revenue Act, 1889 (52 & 53 Vict. c. 42), s. 19. As to life assurance generally, see title INSURANCE.

(*u*) R. S. C., Ord. 22, r. 18A.

(*a*) *I.e.*, in the case of applications in the Principal Registry, the Estate Duty Office, Somerset House; elsewhere, the local Inland Revenue (Stamp) office.

(*b*) Stamp Act, 1815 (55 Geo. 3, c. 184), s. 38; Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 92. See p. 167, *ante;* and title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 215.

(*c*) Probate Rules (Non-Contentious), 1862, r. 37.

(*d*) As to the nature of the bond, see p. 206, *post.* As to the lodgment of the oath and papers to lead to grant, see p. 167, *ante;* and Encyclopædia of Forms and Precedents, Vol. XVI., p. 689. In cases of intestacy where the whole estate and effects do not exceed £100 in value, application for a grant of administration may be made to the registrar of the county court by the widow and children of the intestate, or by the children of poor widows, if they reside more than three miles from the district probate registry; see Intestates Act, 1873 (36 & 37 Vict. c. 52), and Intestates Act, 1875 (38 & 39 Vict. c. 27). The registrar of the county court transmits the necessary documents to the probate registrar, who, in his turn, transmits the grant to the county court registrar for delivery. See also title COUNTY COURTS, Vol. VIII., p. 623.

SECT. 6.
Special and Limited Grants of Administration.

SECT. 6.—*Special and Limited Grants of Administration.*

SUB-SECT. 1.—*Administration cum testamento annexo.*

Grant *cum testamento annexo* where there is no executor appointed, or where appointment fails.

423. Administration with the will annexed is granted in cases where a person dies testate without having appointed an executor, or where the appointment fails. The appointment fails: (1) Where the executor predeceases the testator, or dies without having proved the will; (2) where the executor has renounced (*e*) or has failed to appear to a citation to take probate (*f*); (3) where the executor, owing to the disqualification of minority or unsoundness of mind, is incapable of proving.

Special cases.

424. In certain special cases it may also be necessary to make such a grant, as where the appointment of his executor is directed by the testator not to take effect until after an interval of time (*g*), or where there is a will containing a valid execution of a power, but not made in conformity with the laws of the testator's domicil (*h*).

Grant follows the interest.

425. The grant is discretionary, and no party is of right entitled to it (*i*). It is made (if at all) to the person having the greatest interest. The residuary legatee has preference over all others, legatees, annuitants (*k*), and next of kin (*l*). The trustee of the residuary estate, if there be one, has priority over the person beneficially entitled (*m*), though a bare trustee may be passed over (*n*). The residuary devisee is equally entitled with the residuary legatee, and either should be cleared off before the other can take.

Where no trustee of residue.

426. In the absence of a trustee of the residuary estate, the grant goes to the person beneficially entitled to the residue; the fact that he is also next of kin does not disentitle him to the grant (*o*). The grant may be made to the nominee of the person beneficially

(*e*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 79; see p. 143, *ante*.

(*f*) Court of Probate Act, 1858 (21 & 22 Vict. c. 95), s. 16. An executor cannot appear to a citation and consent to a grant to another of administration with the will annexed; he must withdraw his appearance (*Garrard* v. *Garrard* (1871), L. R. 2 P. & D. 238). Where the executor is believed to be living, but has disappeared, a grant may be made to a beneficiary, without citation of or notice to the executor (*In the Goods of Crawshay*, [1893] P. 108; *In the Goods of Massey*, [1899] P. 270; *In the Goods of Wright* (1898), 79 L. T. 473).

(*g*) *Graysbrook* v. *Fox* (1565), 1 Plowd. 275, 279; see also p. 138, *ante*.

(*h*) *In the Goods of Huber*, [1896] P. 209; *In the Goods of Vannini*, [1901] P. 330, explaining *In the Goods of Hallyburton* (1866), L. R. 1 P. & D. 90; *In the Goods of Tréfond*, [1899] P. 247.

(*i*) *In the Goods of Southmead* (1842), 3 Curt. 28.

(*k*) *Atkinson* v. *Barnard* (1815), 2 Phillim. 316.

(*l*) *West and Smith* v. *Willby* (1820), 3 Phillim. 374, 381.

(*m*) The grant may be made to a trustee appointed in place of the trustee named in the will (*Woodfall* v. *Arbuthnot* (1873), L. R. 3 P. & D. 108), but the grant will not be made, except with the consent of all the beneficiaries, until the trust property is actually vested in the new trustee (*Cresswell* v. *Cresswell* (1824), 2 Add. 342).

(*n*) *Fawkener and Freemantle* v. *Jordan* (1756), 2 Lee, 327; see, too, *Coussmaker* v. *Chamberlayne* (1755), 2 Lee, 243; and *Boddicott and Hamilton* v. *Dalzeel* (1756), 2 Lee, 294.

(*o*) *Linthwaite* v. *Galloway* (1757), 2 Lee 414.

entitled (*p*), his appointee, where he has a power of appointing the residue (*q*), his trustee in bankruptcy (*r*), or a trustee of a deed of assignment executed by him for the benefit of his creditors (*s*). When the residue is settled, a legatee for life is preferred to the remainderman, or, as he is called, the substituted legatee (*t*). In the case of conflict between several residuary legatees, the grant goes to the one who represents the majority of interests (*a*).

Right of representative of residuary legatee.

The representative of a residuary legatee who had attained a vested interest has the same claim to the grant as the residuary legatee himself (*b*); but the representative of a life tenant of the residue has no such claim (*c*).

To whom the grant goes in default of a residuary egatee.

427. Failing a residuary legatee or devisee, the grant goes to the husband, widow, next of kin, or heir-at-law (*d*). The husband or widow is equally entitled with (but in practice is preferred to) the next of kin and heir-at-law, but not the representative of the husband or widow. Where the residue is of trifling value the grant may be made to a pecuniary legatee (*e*). Where there is no gift of residue and no husband or widow, next of kin, or heir-at-law, the grant goes to a pecuniary legatee, whatever the amount of estate. If the estate be insolvent, the grant may go to a creditor (*f*), or to his assignee (*g*). A grant may also, in special circumstances, be made to a stranger on the application of persons entitled in distribution, though not next of kin, even without citing the next of kin (*h*).

A testamentary instrument merely revoking a prior will not annexed to grant.

428. Where a testator has revoked his will by a duly executed testamentary paper, and has died without making any disposition of his property, the grant should go as upon an intestacy without annexing the testamentary paper, the grant containing a note that it is so made in consequence of the execution of the paper revoking the earlier will (*i*).

SUB-SECT. 2.—*Administration de bonis non.*

Grant *de bonis non.*

429. Where a sole or last surviving executor dies intestate without having fully administered, his administrator does not

(*p*) *In the Goods of Pine* (1867), L. R. 1 P. & D. 388; see, too, *In the Goods of M'Auliffe*, [1895] P. 290.
(*q*) *In the Goods of Martindale* (1858), 1 Sw. & Tr. 8.
(*r*) *Downward* v. *Dickinson* (1864), 3 Sw. & Tr. 564.
(*s*) *Mayhew* v. *Newstead* (1837), 1 Curt. 593.
(*t*) *Brown* v. *Nicholls* (1851), 2 Rob. Eccl. 399.
(*a*) *Sawbridge* v. *Hill* (1871), L. R. 2 P. & D. 219.
(*b*) *Wetdrill* v. *Wright* (1814), 2 Phillim. 243, 248; *In the Goods of Thirlwall* (1848), 6 Notes of Cases, 44; see, too, *In the Goods of Lalor* (1901), 85 L. T. 643.
(*c*) *Jones* v. *Beytagh* (1821), 3 Phillim. 635.
(*d*) *Kooystra* v. *Buyskes* (1821), 3 Phillim. 531; *West and Smith* v. *Willby* (1820), 3 Phillim. 374, 381; Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 2 (4).
(*e*) *In the Goods of Homan* (1883), 9 P. D. 61.
(*f*) *Furlonger* v. *Cox* (1811) and *Bridges* v. *Newcastle* (*Duke*) (1712), cited in *West and Smith* v. *Willby*, *supra*, at p. 381. For the rights of a creditor to a grant of administration, see p. 188, *ante*.
(*g*) *In the Goods of Cosh* (1909), 25 T. L. R. 785.
(*h*) *In the Goods of Moffatt*, [1900] P. 152.
(*i*) *Toomer* v. *Sobinska*, [1907] P. 106, departing from the form of grant in *In the Goods of Durance* (1872), L. R. 2 P. & D. 406.

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become the representative of the original testator, and it is accordingly necessary to appoint an administrator *de bonis non* to administer the goods of the original testator left unadministered (*k*). Where the will of the original testator has been proved abroad, and the executor dies without proving it in England, the executor of the latter, though he prove his own testator's will in England, does not thereby become the representative of the original testator; he must obtain a similar grant of administration (*l*). Where an executor has acted and dies without obtaining probate, the grant in respect of his testator's estate is immediate in representation, and not *de bonis non* (*m*).

Death of sole or surviving executor without having fully administered.

Death of sole or surviving administrator.

Similarly, upon the death of a sole or surviving administrator, the chain of representation must be continued by the appointment of an administrator *de bonis non* (*n*). The court has power to appoint an administrator *de bonis non* where the original administrator has disappeared (*o*).

Rights of preference observed.

430. In making a grant *de bonis non* the court has regard to the same rights of preference by which an original grant is regulated and thus follows the general practice of making the grant to those who have the greatest interest (*p*). Where there is no residuary estate the court may make the grant to a pecuniary legatee without requiring the residuary legatee to be cited or to renounce (*q*). It prefers an original to a derivative interest, but may depart from this preference on sufficient grounds (*r*). The fact that one of the next of kin (deceased) renounced when the original grant of administration was made does not preclude his personal representative from obtaining such a grant. A grant *de bonis non* is also made where the original grant was a Scottish or Irish grant resealed in England (*s*).

Inland Revenue affidavit.

431. The applicant for administration *de bonis non* must prepare the usual affidavit for Inland Revenue purposes and take the oath. The estate is sworn at the value of what remains unadministered at the time. Where death duty in respect of the full value of the estate was paid in the first instance, no further duty is payable (*t*).

Memorial for duty-paid stamp.

A memorial must be lodged in the Estate Duty Office at Somerset House asking that a duty-paid stamp or a certificate of payment of

(*k*) 2 Bl. Com. 506.
(*l*) *In the Goods of Gaynor* (1869), L. R. 1 P. & D. 723.
(*m*) *Wankford* v. *Wankford* (1703), 1 Salk. 299, 308.
(*n*) 2 Bl. Com. 506.
(*o*) *In the Estate of Saker*, [1909] P. 233; *In the Estate of French* (*Edith*), [1910] P. 169.
(*p*) *Savage* v. *Blythe* (1796), 2 Hag. Ecc., Appendix, 150; *Almes* v. *Almes* (1796), 2 Hag. Ecc., Appendix, 155.
(*q*) *In the Goods of Wilde* (1887), 13 P. D. 1.
(*r*) *In the Goods of Carr* (1867), L. R. 1 P. & D. 291.
(*s*) As to resealing, see p. 172, *ante*.
(*t*) Probate Duty Act, 1801 (41 Geo. 3, c. 86), s. 3. Where the person in respect of whose estate the application is made died before the 2nd August, 1894, the grant is stamped with a denoting stamp; where he died on or since the 2nd August, 1894, a certificate is obtained from the Inland Revenue Commissioners that the full estate duty has been paid; see Finance Act, 1894 (57 & 58 Vict. c. 30), s. 11. As to the appropriate forms of Inland Revenue affidavit, see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 215; and pp. 167 and 193, *ante*.

duty may be placed on the Inland Revenue affidavit; such stamp or certificate must be obtained before the papers can be lodged in the probate registry. A bond must be filed in every case as on an application for a first grant (*u*). Where administration with the will annexed *de bonis non* is applied for, the administrator may be sworn either on the old grant, or on a sealed copy of the will, or on the original will, if it is filed in the registry (*x*).

SUB-SECT. 3.—*Administration durante minore ætate.*

Grant *durante minore ætate.* When required.

432. When the person appointed sole executor by will (*a*), or upon whom, in case of intestacy, the right to administer devolves (*b*) is under age, administration *durante minore ætate* is necessary. No such grant can be made where there is an executor willing and competent to take probate; but the grant issues where there are several next of kin, and the greater interest is in some who are under age (*c*).

Grant made to guardian.

The administration is granted to a guardian for the use and benefit of the person under age. If the latter is over seven years of age he is styled a minor, and is entitled to elect his guardian (*d*); if he is under seven years of age he is called an infant, and in the absence of a statutory or testamentary guardian, or of a guardian appointed by the Chancery Division, the Probate Division must assign a guardian to him (*e*). Where there are both a minor and infants, the guardian elected by the minor may act for the infants without being specially assigned to them, if the object is to take a grant; if the object be to renounce a grant, the guardian must be specially assigned to the infants (*f*).

Preferences observed.

433. In practice the grant of administration is made to the child's next of kin, and accordingly the father, if alive, is entitled to the grant before all others; it is, however, necessary for the child, if over seven years of age, to elect him as his guardian (*g*). The court has power to pass over the father for good reason shown (*h*).

434. If there be no father, the mother, as statutory guardian (*i*), either alone or in conjunction with any testamentary guardian appointed by the father, or the testamentary guardian, if there be

(*u*) As to administration bonds generally, see pp. 206 *et seq.*, *post.*

(*x*) In every such case a fresh engrossment of the will is required, and also a non-official copy of the act of probate or administration of the preceding grant; see generally as to practice, Tristram & Coote, Probate Practice, 14th ed., pp. 144 *et seq.*

(*a*) Administration of Estates Act, 1798 (38 Geo. 3, c. 87), s. 6.

(*b*) Bac. Abr., tit. Executors and Administrators, B (1).

(*c*) *Cartright's Case* (1679), Freem. (K. B.) 258.

(*d*) *Rich* v. *Chamberlayne* (1752), 1 Lee, 134.

(*e*) Probate Rules (Non-Contentious), 1862, r. 34.

(*f*) *Ibid.*, r. 35.

(*g*) *Ibid.*, r. 33. As to guardianship generally, see title INFANTS AND CHILDREN.

(*h*) *Lovell and Brady* v. *Cox* (undated), cited in *West and Smith* v. *Willby* (1820), 3 Phillim. 374, 379; *In the Goods of Hay* (*Augusta Jane*) (1865), L. R. 1 P. & D. 51; *In the Goods of Stephenson* (1866), L. R. 1 P. & D. 287.

(*i*) Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27). See, generally, title INFANTS AND CHILDREN.

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no mother, or the guardian appointed by the Chancery Division, is entitled to the grant; the testamentary guardian is preferred to the guardian elected by a minor (*k*). The court has a general discretion to pass over the guardian elected by a minor (*l*).

Declaration of personal estate.

435. In all cases where a grant is made for the use and benefit of an infant or minor the administrator must exhibit a declaration on oath of the personal estate and effects of the deceased, except when the effects are sworn under the value of £20, or when the administrator is the guardian appointed by the Chancery Division or other competent court, or is the testamentary guardian of the minor or infant (*m*).

Limit of grant.

436. The administration determines upon the coming of age of the infant or minor or of any one of several infants for whose use and benefit the grant was made: it does not determine upon the death of one of several infants (*n*). Except in point of time there is no other limit to the administration (*o*).

Administrator's liability to account.

437. On the coming of age of the infant, he is entitled to call for an account from the administrator, even though his administration may previously have been revoked and his successor in office may have released him (*p*). If the infant renounce on coming of age, the person who is then appointed administrator is in a position to call for an account (*q*). During his term of office a judgment for administration may be made against an administrator *durante minore ætate* (*r*). After the expiration of his term it would seem that he is not liable to account to creditors, but only to the personal representative, except where it can be shown that he is fraudulently colluding with the latter or detaining part of the estate (*s*).

SUB-SECT. 4.—*Administration durante absentiâ.*

Grant *durante absentiâ.*

Original jurisdiction where executor or next of kin resident out of the jurisdiction.

438. Where the executor of a testator, or the next of kin of an intestate, is resident out of the jurisdiction, the court has an original jurisdiction, before representation has been taken out, to grant a limited administration to another during the absence of the person entitled to the grant (*t*). The grant is for the use and benefit of the person entitled until he duly apply for and obtain probate or letters of administration (*a*).

(*k*) *In the Goods of Morris* (1862), 2 Sw. & Tr. 360.
(*l*) *Fawkener and Freemantle* v. *Jordan* (1750), 2 Lee, 327, 330.
(*m*) Probate Rules (Non-Contentious), 1862, r. 36.
(*n*) *Jones* v. *Strafford (Earl)* (1750), 3 P. Wms. 79, 89. On the coming of age of the minor a fresh grant is necessary; see cessate grants, p. 171, *ante*.
(*o*) *Re Cope, Cope* v. *Cope* (1880), 16 Ch. D. 49; *Monsell* v. *Armstrong* (1872), L. R. 14 Eq. 423; *Re Thompson and M'Williams' Contract*, [1896] 1 I. R. 356.
(*p*) 1 Roll. Abr. 910, tit. Executor (M), pl. 3.
(*q*) *Taylor* v. *Newton* (1752), 1 Lee, 15.
(*r*) *Re Taylor, Sewell* v. *Ransford* (1893), 21 W. R. 244.
(*s*) Bac. Abr., tit. Executors and Administrators, B 7 (2); *Fotherby* v. *Pate* (1747), 3 Atk. 603.
(*t*) Bac. Abr., tit. Executors and Administrators (G); *Clare* v. *Hedges* (1691), cited in *Major* v. *Peck* (1691), 1 Lut. 338, 342; *Slater* v. *May* (1704), 2 Ld. Raym. 1071; see, too, *In the Goods of Cholwill* (1866), L. R. 1 P. & D. 192; *In the Goods of Suarez*, [1897] P. 82; and compare *In the Goods of Wohlgemuth* (1910), 54 Sol. Jo. 460.
(*a*) The form was so settled in *In the Goods of Cassidy* (1832), 4 Hag. Ecc. 366.

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439. Notwithstanding the form of grant, the administrator cannot obtain a judgment for specific performance against a purchaser, as the title would depend upon the question whether the absent person for whose use the administrator holds the grant was alive or not at the date of the execution of the conveyance—a fact which the administrator could not warrant (*b*).

Form of grant.

440. When representation has been already taken out, if at or after (*c*) the expiration of twelve calendar months from the death of the deceased the executor or administrator is residing out of the jurisdiction, the court has power to make a grant *durante absentiâ* on the application of any creditor, next of kin, or legatee (*d*). The power extends to the case of an executor of an executor being out of the jurisdiction (*e*). The grant may be made to the personal representative of a legatee (*f*), the guardian of an infant legatee (*g*), the trustee in bankruptcy of the absent administrator (*h*), or even to the nominee of the assignee of a residuary legatee (*i*). The court does not require citation of or service of formal notice upon the absent representative (*k*).

Statutory jurisdiction in case of absent representative.

To whom grant may be made under the statutory jurisdiction.

SUB-SECT. 5. *Administration durante dementiâ.*

441. Where the executor or, in case of intestacy, the person entitled to a grant of administration is of unsound mind, whether so found or not (*l*), a grant is made to another for the use and benefit of the person of unsound mind, limited for such period as the latter may remain of unsound mind (*m*). In the case of executorship, the grant is not made if there is another executor willing and competent to take probate.

Grant *durante dementiâ.*

Where person entitled to administer is of unsound mind.

The court has jurisdiction to make a similar grant where the executor is so seriously ill that it is found impossible to serve him with a citation to accept or refuse probate (*n*).

Where executor seriously ill.

in order to avoid the difficulties which had arisen under the earlier form of grant, which was limited to the absence of the person entitled. For an instance of such difficulties, see *Taynton* v. *Hannay* (1802), 3 Bos. & P. 26.

(*b*) *Webb* v. *Kirby* (1856), 7 De G. M. & G. 376.

(*c*) *In the Goods of Ruddy* (1872), L. R. 2 P. & D. 330.

(*d*) This power was created by the Administration of Estates Act, 1798 (38 Geo. 3, c. 87), under which statute the grant could only be made during the absence of an executor and for the purpose of proceedings in equity. By the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 74, the jurisdiction was extended to cover the absence of an administrator, and by the Court of Probate Act, 1858 (21 & 22 Vict. c. 95), s. 18, the provisions of the original Act were extended to all executors and administrators out of the jurisdiction in cases where there was no intention to take proceedings in equity.

(*e*) *In the Goods of Grant* (1876), 1 P. D. 435.

(*f*) *In the Goods of Collier* (1862), 2 Sw. & Tr. 444.

(*g*) *In the Goods of Hampson* (1865), L. R. 1 P. & D. 1; *In the Goods of Lee*, [1898] 2 I. R. 81.

(*h*) *In the Goods of Hammond* (1881), 6 P. D. 104.

(*i*) *In the Goods of Campion*, [1900] P. 13.

(*k*) *Ibid.*

(*l*) *Ex parte Evelyn* (1833), 2 My. & K. 3. As to lunatics generally, see title LUNATICS AND PERSONS OF UNSOUND MIND.

(*m*) *In the Goods of Milnes* (1826), 3 Add. 55; *In the Goods of Binckes* (1836), 1 Curt. 286.

(*n*) *In the Goods of Ponsonby*, [1895] P. 287.

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The grant may be made to the committee of a person found lunatic by inquisition (*o*), or to the person appointed with general authority over the lunatic's property where there has been no such finding (*p*).

Where no committee.

442. In the absence of a committee or a person with general authority over the estate, the grant, in the case of a testacy, is made to the residuary legatee or devisee, and in default of a residuary legatee or devisee to the lunatic's husband, wife, next of kin, or heir-at-law, according to the circumstances: in the case of intestacy to the lunatic's husband, wife, next of kin, or heir-at-law according to the circumstances, if the lunatic be the sole next of kin and the only person entitled in distribution (*q*): if the lunatic, though having the prior right to administer, is not the only person entitled in distribution, the grant may be made to another of the persons entitled in distribution on his own behalf (*r*).

Grant to stranger or creditor.

443. The court may make the grant to a stranger (*s*) or to a creditor (*t*), but the consents of the next of kin of the lunatic should be filed in the probate registry (*a*).

Declaration of estate.

When a person, other than the committee, takes letters of administration for the use and benefit of a lunatic or person of unsound mind, he must file in the registry a declaration of the personal estate and effects of the testator or intestate, and the sureties to the administration bond must justify (*b*).

When representative becomes of unsound mind new grant is made.

Where a sole representative becomes of unsound mind after having obtained a grant, the practice is, without revoking the old grant, to make a new grant to the committee or person in the position of a committee, if there be one; if there be none, to the residuary legatee or devisee, in the case of testacy, and in the case of intestacy to another of the next of kin. The new grant is for the use and benefit of the lunatic during such period as he may remain of unsound mind; it is usually a general grant, but may be limited (*c*).

When old grant is impounded.

Where the new grant is made to the committee or person in the position of a committee, the old grant is not called in; in the other cases the precaution is taken of having the old grant impounded (*d*). In the case of a foreigner, the new grant may be made to the foreign curator (*e*).

(*o*) *Alford* v. *Alford* (1857), Dea. & Sw. 322.

(*p*) For appointments of persons with general authority over the estate of a lunatic not so found by inquisition, see Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 116; and title LUNATICS AND PERSONS OF UNSOUND MIND.

(*q*) See *In the Goods of Hastings* (1877), 4 P. D. 73.

(*r*) *In the Goods of Williams* (1830), 3 Hag. Ecc. 217.

(*s*) *In the Goods of Burrell* (1858), 1 Sw. & Tr. 64; *In the Goods of Eccles* (1889), 15 P. D. 1.

(*t*) *In the Goods of Penny* (1846), 1 Rob. Eccl. 426.

(*a*) *In the Goods of Penny, supra; In the Goods of Hastings, supra.*

(*b*) Probate Rules (Non-Contentious), 1862, r. 42. As to justifying, see p. 209, *post.*

(*c*) *In the Goods of Crump* (1821), 3 Phillim. 497.

(*d*) *In the Goods of Cooke*, [1895] P. 68, where the practice is fully set out in the judgment of the President (Sir F. H. JEUNE); see, too, *In the Goods of Binckes* (1836), 1 Curt. 286.

(*e*) *In the Goods of Goldschmidt* (1898), 78 L. T. 763.

In the case of one of several executors or administrators becoming of unsound mind, the old grant is revoked and a new grant made to the sane representatives (*f*).

SUB-SECT. 6.—*Administration pendente lite.*

Grant *pendente lite.*

444. Where an action is pending touching the validity of the will of a deceased person, or for obtaining, recalling, or revoking any probate or grant of administration, the court has a statutory power (*g*) to appoint an administrator of the personal estate of such person. The administrator so appointed has all the rights and powers of a general administrator except the right of distributing the residue; he is subject to the immediate control of the court, and acts under its directions.

Jurisdiction to appoint an administrator *pendente lite.*

Power to appoint receiver of real estate.

The court has a further statutory power (*h*) of appointing such administrator or any other person receiver of the real estate of a testator pending any action touching the validity of any will of the testator by which his real estate may be affected (*i*). The receiver is to have such powers of collection, letting, and management as the court may direct. The court has also, as a branch of the High Court of Justice, general jurisdiction to appoint a receiver in any case in which it may appear just or convenient so to do (*k*).

When power exercised.

To found the jurisdiction there must be an action actually pending in the Probate Division; proceedings on a caveat do not constitute an action (*l*). The application may be made by any person, though not a party to the pending action, as, for instance, a creditor (*m*); but the court has no power to order the administrator to pay the creditor's debt (*n*). The jurisdiction is not exercised where there is a person legally entitled to represent or take possession of the property, as in the case of a surviving partner (*o*); but it is not confined to cases of necessity (*p*).

(*f*) *In the Estate of Shaw*, [1905] P. 92; *In the Goods of Newton* (1843), 3 Curt. 428.

(*g*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 70.

(*h*) *Ibid.*, s. 71. The court has power to allow the administrator *pendente lite* to pay a premium out of the estate to the surety to his bond (*In the Goods of Harver* (*G.*) (1889), 14 P. D. 81).

(*i*) This power is strictly confined to the pendency of an action touching the validity of a will; it does not extend to one in which the question raised is as to the identity of the executor (*Grant* v. *Grant* (1869), L. R. 1 P. & D. 654); nor will it be exercised when the action is concerned with the validity of a codicil only, the appointment of the executor by the will not being in dispute (*Mortimer* v. *Paull* (1870), L. R. 2 P. & D. 85).

(*k*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8); see also title RECEIVERS.

(*l*) *Salter* v. *Salter*, [1896] P. 291, C. A.

(*m*) *Tichborne* v. *Tichborne, Ex parte Norris* (1869), L. R. 1 P. & D. 730; *In the Goods of Evans* (1890), 15 P. D. 215; *In the Estate of Cleaver*, [1905] P. 319.

(*n*) *In the Goods of Evans, supra.*

(*o*) *Horrell* v. *Witts and Plumley* (1866), L. R. 1 P. & D. 103.

(*p*) *Bellew* v. *Bellew* (1865), 34 L. J. (P. M. & A.) 125, in which case Sir J. P. WILDE stated that he would not follow the established practice of requiring a case of necessity to be made out before making the grant, but would adopt the practice of the Chancery Courts, and make the grant wherever a Chancery Court would appoint a receiver. For the appointment of receivers, generally, see title RECEIVERS.

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Administration *pendente lite* is in general granted wherever the Chancery Division would appoint a receiver (*q*).

Appointment of receiver by Chancery Division.

445. Where there is no action pending in the Probate Division, the appointment of a receiver may, in a case of urgency, be obtained in the Chancery Division (*r*); but the parties interested in obtaining representation should be before the court (*s*). If there is an action already pending in the Probate Division, the application for a receiver should be made in that action (*t*).

Upon the appointment of an administrator *pendente lite* by the Probate Division the Chancery Division discharges its receiver, but retains control over the dealings of the administrator (*a*); and the Probate Division refuses to interfere with the administrator when he is acting under the direction of the Chancery Division (*b*).

Where the deceased left realty, notice to the heir-at-law is required before the appointment of administrator *ad litem* or receiver (*c*).

Practice.

It is not the practice of the Probate Division, except on consent, to appoint a party to the action either as administrator or as receiver (*d*).

After the order appointing an administrator *pendente lite* has been made, in applying at the registry for a grant the following papers must be lodged:—the administrator's oath and bond, a justifying affidavit of the sureties to the bond, a declaration of estate, an Inland Revenue affidavit, and a non-official copy of the order (*e*).

Determination of office.

446. The functions of an administrator *pendente lite* commence with the order appointing him, and continue until the action is

(*q*) *Bellew* v. *Bellew* (1865), 34 L. J. (P. M. & A.) 125.

(*r*) *Re Parker, Dearing* v. *Brooks* (1885), 54 L. J. (CH.) 694. In *In the Goods of Moore* (1888), 13 P. D. 36, the Probate Court gave leave to issue a writ in the Probate Division claiming the appointment of a receiver. The order cannot be made before writ issued (*Salter* v. *Salter*, [1896] P. 291, C. A.). In *Re Mallalieu, Radcliffe* v. *Mallalieu* (1891), 91 L. T. Jo. 398, the order was made in the Chancery, rather than in the Probate, Division. See also *Re Clark, Clark* v. *Clark* (1910), 55 Sol. Jo. 64.

(*s*) *Re Henderson, Macleod* v. *Lane* (1886), 2 T. L. R. 322, C. A.

(*t*) *Barr* v. *Barr*, [1876] W. N. 44; *Re Green, Green* v. *Knight*, [1895] W. N. 69. Prior to the Judicature Act, 1873 (36 & 37 Vict. c. 66), the Chancery Court exercised the jurisdiction of appointing a receiver whether of personalty or realty, but not after the institution of a suit in the Probate Court (*Veret* v. *Duprez* (1868), L. R. 6 Eq. 329; *Hitchen* v. *Birks* (1870), L. R. 10 Eq. 471; *Parkin* v. *Seddons* (1873), L. R. 16 Eq. 34).

(*a*) *Tichborne* v. *Tichborne, Ex parte Norris* (1869), L. R. 1 P. & D. 730.

(*b*) *Tichborne* v. *Tichborne* (1870), L. R. 2 P. & D. 41.

(*c*) *Wiggins* v. *Hudson* (1899), 80 L. T. 296; compare also *In the Goods of Messiter-Terry, Mathew* v. *Tooze* (1908), 24 T. L. R. 465, where an administrator *pendente lite* and receiver was appointed without citing the alleged heir-at-law.

(*d*) *Stratton* v. *Ford* (1754), 2 Lee, 49; *Young* (otherwise *Mearing*) v. *Brown* (1827), 1 Hag. Ecc. 53; *De Chatelain* v. *Pontigny* (1858), 1 Sw. & Tr. 34.

(*e*) The amount of the bond must be fixed by the registrar. As to administration bonds generally, see p. 206, *post*. As to declaration of estate, see pp. 198, 200, *ante*. As to Inland Revenue affidavits, see pp. 167 and 193, *ante*, and title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 215.

finally disposed of (*f*). This takes place when the final decree is made therein: it does not continue until the grant has actually passed the seal; after the final decree in the action the position is the same as if there had never been an action or suit (*g*). The administrator may, however, in certain cases be entitled to retain money received by him until his accounts have been brought in and passed (*h*). While his functions continue, he is liable to be sued by a creditor without leave of the court, in the same way as a general administrator (*i*), and there is no jurisdiction to stay proceedings against him (*j*).

SECT. 6. Special and Limited Grants of Administration.

Liability to be sued.

447. Every administrator *pendente lite* and every receiver of real estate must exhibit an inventory and render an account of the property of the deceased which has come to his hands (*k*), and must pay all he has received to the person pronounced by the court to be entitled (*l*). The Probate Division has statutory authority to allow reasonable remuneration to the administrator and receiver (*m*).

Administrator's accounts.

SUB-SECT. 7.—*Miscellaneous Limited Grants.*

448. In the case of a person actually residing out of England (*n*), letters of administration may be granted to his attorney acting under a power of attorney (*o*). The attorney need not necessarily be resident in England (*p*), and in special circumstances sureties resident abroad may be accepted (*q*). If the principal and attorney reside in the same place out of the jurisdiction, the court will not as a rule make a grant to the attorney.

Grant for use of person abroad.

When made.

The form of grant is for the use and benefit of the principal until he shall duly apply for and obtain probate or letters of administration, as the case may be (*r*). If the grant is made to the attorney of one only of several executors, it is limited until the principal or any one of the other executors applies for probate (*s*). On the death of the principal the grant ceases to

Form of the grant.

(*f*) *Taylor* v. *Taylor* (1881), 6 P. D. 29.
(*g*) *Wieland* v. *Bird*, [1894] P. 262.
(*h*) *Wieland* v. *Bird*, *supra*. As to passing accounts, see p. 339, *post*.
(*i*) *Re Toleman, Westwood* v. *Booker*, [1897] 1 Ch. 866. See, too, *Tichborne* v. *Tichborne* (1870), L. R. 2 P. & D. 41. As to actions against a general administrator, see pp. 330 *et seq.*, *post*.
(*j*) *Martin* v. *Toleman* (1897), 77 L. T. 138
(*k*) Probate Rules (Contentious) (1862), r. 96
(*l*) *Charlton* v. *Hindmarsh* (1860), 1 Sw. & Tr. 519.
(*m*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 72.
(*n*) *In the Goods of Burch* (1861), 2 Sw. & Tr. 139. Where an estate consisted only of trust property administration was granted to the attorney of a person resident in England (*In the Goods of Bullar* (1870), 39 L. J. (P. & M.) 26).
(*o*) Probate Rules (Non-Contentious), 1862, r. 32. A substituted attorney will be accepted, if substitution is authorised by the power, or by the laws of the domicil of the creator of the power (*In the Goods of Abdul Hamid Bey* (1898), 67 L. J. (P.) 59). A general power executed during the testator's lifetime has been held sufficient (*In the Goods of Barker*, [1891] P. 251).
(*p*) *In the Goods of Leeson* (1859), 1 Sw. & Tr. 463.
(*q*) *In the Goods of Reed* (1864), 3 Sw. & Tr. 439; and *In the Goods of Ballingall* (1863), cited 3 Sw. & Tr. 441, n.
(*r*) *In the Goods of Cassidy* (1832), 4 Hag. Ecc. 360.
(*s*) *In the Goods of Black* (1887), 13 P. D. 5.

SECT. 6. Special and Limited Grants of Administration.

be of any force (*t*). The power should be under seal, but is exempt from stamp duty unless it is a general power (*a*). The original power, if a general power, may be withdrawn from the registry after grant on lodging a copy of it.

Position of the attorney.

449. The attorney is, as regards the claims of third parties, as fully an administrator as if he had obtained the grant in his own right (*b*), and is liable to be sued by the parties beneficially interested in the estate (*c*). It has, however, been held that if, before being sued, he pays over moneys to the principal on whose behalf he has obtained the grant, he gets a good discharge (*d*). But he cannot get a good discharge from a principal who has not obtained representation in any country (*e*).

Grants *ad colligenda bona.*

450. A grant for getting in and preserving the assets of a deceased person may be made in cases where delay in obtaining the full grant might prove detrimental to the estate (*f*). The grant may be made even to a stranger connected as an agent or otherwise with the deceased's affairs (*g*).

Limitations of the grant.

The grant, which is known as a grant *ad colligenda bona*, is usually limited to the collection of the personal estate of the deceased, the giving of discharges for debts due to the estate, and the preservation of the assets collected either by investment or by payment into court (*h*). The grant may authorise the administrator to renew a lease (*i*), to let farms and other portions of the real estate, with power to sell farm stock and implements of husbandry (*k*), or the goodwill of a business (*l*).

Where will of the testator in foreign country or mislaid.

451. A grant of a similar nature may be made in a case where the will of a testator is in a foreign country (*m*), or where there is believed to have been a will which has been accidentally mislaid or destroyed (*n*). The grant is limited in time until the original will or an authenticated copy thereof be brought into the registry (*o*).

(*t*) *Webb* v. *Kirby* (1856), 7 De G. M. & G. 376.

(*a*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Schedule. See title AGENCY, Vol. I., p. 160.

(*b*) *Re Dewell, Edgar* v. *Reynolds* (1858), 4 Drew. 269, 272. As to liabilities of representative upon which he may be sued, see pp. 305 *et seq.*, *post.*

(*c*) *Chambers* v. *Bicknell* (1843), 2 Hare, 536.

(*d*) *De la Viesca* v. *Lubbock* (1840), 10 Sim. 629; *Eames* v. *Hacon* (1881), 18 Ch. D. 347, C. A.

(*e*) *Re Rendell, Wood* v. *Rendell*, [1901] 1 Ch. 230.

(*f*) *In the Goods of Clarkington* (1861), 2 Sw. & Tr. 380; *In the Goods of Wyckoff* (1862), 3 Sw. & Tr. 20.

(*g*) *In the Goods of Radnall* (1824), 2 Add. 232; *In the Goods of Gudolle* (1835), cited in *In the Goods of Wyckoff, supra*, at p. 22.

(*h*) The powers conferred on an administrator *ad colligenda bona* may be extended so as to include, for instance, a power to sell chattels real. As to the administrator's liability for rent in such a case, see *Whitehead* v. *Palmer*, [1908] 1 K. B. 151.

(*i*) *In the Goods of Clarkington, supra.*

(*k*) *In the Goods of Roberts*, [1898] P. 149.

(*l*) *In the Goods of Schwerdtfeger* (1876), 1 P. D. 424; *In the Goods of Bolton*, [1899] P. 186.

(*m*) *In the Goods of Metcalfe* (1822), 1 Add. 343; *In the Goods of Brown* (1899), 80 L. T. 360.

(*n*) *In the Goods of Campbell* (1829), 2 Hag. Ecc. 555; *In the Goods of Wright*, [1893] P. 21.

(*o*) *In the Goods of Wright, supra; In the Goods of Greig* (1866), L. R.

SECT. 6. Special and Limited Grants of Administration.

Administration *ad litem*.

452. Administration may be granted *ad litem* by the Probate Division with a view to commencing (*p*) or carrying on Chancery proceedings (*q*). The administrator under such a grant sufficiently represents the estate for the purpose of the proceedings, where it is merely desired to bind the estate of a person who, if alive, would have been a necessary party to the proceedings (*r*). Where the object of the Chancery proceedings is to administer the estate in respect of which a grant *ad litem* has been obtained, or to obtain relief involving general accounts and inquiries in respect of the estate, a general administrator is a necessary party to the action (*s*).

General jurisdiction of the High Court to dispense with representatives, or to appoint a representative *ad litem*.

453. All branches of the High Court of Justice have a further power whenever it appears that a person who was interested in the matter in question has no legal personal representative, either to proceed in the absence of a representative, or to appoint some person to represent the estate for all the purposes of the proceedings, and by means thereof to bind the estate as effectually as if a duly constituted representative had been a party to the proceedings (*t*). The order should state that the judge has proceeded in the absence of any person representing or entitled to represent the estate, or has appointed some person to represent it (*a*).

When representative *ad litem* appointed.

The jurisdiction may be exercised in proceedings by mortgagees (*b*), but not with a view to making a foreclosure order against a sole defendant's estate (*c*), nor generally to bind the estate of a deceased who was the only person liable in the action (*d*). But the court may appoint a person to represent the estate of a sole plaintiff who has died insolvent, to enable the defendant to have someone against whom he may move for dismissal of the action (*e*). The

1 P. & D. 72. In *In the Goods of Campbell* (1829), 2 Hag. Ecc. 555, the grant was not so limited.

(*p*) *Woolley* v. *Green* (1820), 3 Phillim. 314.

(*q*) *In the Goods of Dodgson* (1859), 1 Sw. & Tr. 259; *In the Goods of Frampton, Day* v. *Thompson* (1863), 3 Sw. & Tr. 169.

(*r*) *Faulkner* v. *Daniel* (1843), 3 Hare, 199; *Davis* v. *Chanter* (1848), 2 Ph. 545; *Groves* v. *Lane* (1852), 16 Jur. 1061; *Williams* v. *Allen* (No. 2) (1863), 32 Beav. 650.

(*s*) *Groves* v. *Lane* (1852), *supra*; *Dowdeswell* v. *Dowdeswell* (1878), 9 Ch. D. 294, C. A.

(*t*) R. S. C., Ord. 16, r. 46. This rule was adapted with slight alteration from stat. (1852) 15 & 16 Vict. c. 86, s. 44 (now repealed). Under the section of the statute it was held that the power did not apply where the estate to which it was desired to appoint a representative was the estate which was being administered (*Silver* v. *Stein* (1852), 1 Drew. 295; see, too, *Vacy* v. *Vacy* (1860), 1 L. T. 267; *Maclean* v. *Dawson* (No. 1) (1859), 27 Beav. 21; *Moore* v. *Morris* (1871), L. R. 13 Eq. 139, *per* ROMILLY, M.R., at p. 140).

(*a*) *Re Richerson, Scales* v. *Heyhoe*, [1893] 3 Ch. 146.

(*b*) *Curtius* v. *Caledonian Fire and Life Insurance Co.* (1881), 19 Ch. D. 534, C. A.; *Peat* v. *Gott*, [1885] W. N. 46; *Neal* v. *Barrett*, [1887] W. N. 88; *Scott* v. *Streatham and General Estates Co., Ltd.*, [1891] W. N. 153; see also title MORTGAGE.

(*c*) *Aylward* v. *Lewis*, [1891] 2 Ch. 81.

(*d*) *Re Curtis and Betts*, [1887] W. N. 126, C. A.

(*e*) *Wingrove* v. *Thompson* (1879), 11 Ch. D. 419.

SECT. 6. Special and Limited Grants of Administration.

court ought not to appoint a person unwilling to be appointed (*f*). Money will not be paid out of court to a person appointed to represent the estate, but will be carried over to a separate account (*g*).

Grants limited to specific effects.

454. A grant may be made to a *cestui que trust* limited to the trust fund where the trustee in whose name the trust fund stands is dead and, without a personal representative (*h*); if the trustee died testate his will should be annexed to the grant (*i*). Where several persons are interested in the trust fund the grant is limited to the interest of the applicant, unless the others consent to the grant extending to their respective interests (*k*). The person entitled to administer the trust fund should be cited (*l*).

To a trust fund.

Various instances.

455. A grant may be made limited to a legacy (*m*), to a fund appropriated for the payment of a legacy (*n*), to property the subject of a mortgage (*o*), to the appointment of a new trustee and the vesting of the trust property in him (*p*), to bringing particular actions (*q*), to the estate and effects of a married woman, except such as she had power to and did, in fact, dispose of by her will (*r*). In the case of a will effectually executing a power, but otherwise invalid, the grant to the appointee with the will annexed should be limited to such property as the testatrix had power to and did, in fact, dispose of by her will (*s*).

Not made to a person entitled to general grant.

A limited grant should not be made to a person entitled to a general grant, unless a very strong reason is given (*t*); it cannot be made to such a person, except under the direction of the court (*a*).

SECT. 7.—*The Administrator's Bond.*

SUB-SECT. 1.—*Nature of the Bond.*

The bond. Nature.

456. A person to whom any grant of administration is committed must give a bond for the due collecting, getting in, and administering the estate of the intestate (*b*). The court has no

(*f*) *Re Curtis and Betts*, [1887] W. N. 126, C. A.; *Prince of Wales etc. Association Co.* v. *Palmer* (1858), 25 Beav. 605; *Hill* v. *Bonner* (1858), 26 Beav. 372.

(*g*) *Rawlins* v. *M'Mahon* (1852), 1 Drew. 225; *Byam* v. *Sutton* (1855), 19 Beav. 646.

(*h*) *In the Goods of Ratcliffe*, [1899] P. 110; *In the Goods of Agnese*, [1900] P. 60; *Murray* v. *Champernowne*, [1901] 2 I. R. 232.

(*i*) *In the Goods of Butler*, [1898] P. 9.

(*k*) *Pegg* v. *Chamberlain* (1860), 1 Sw. & Tr. 527.

(*l*) *Pegg* v. *Chamberlain*, *supra*; *In the Goods of Kingwell* (1899), 81 L. T. 461.

(*m*) *In the Goods of Steadman* (1828), 2 Hag. Ecc. 59; *In the Goods of Baldwin*, [1903] P. 61.

(*n*) *In the Goods of Biou* (1843), 3 Curt. 739.

(*o*) *In the Goods of Lowe* (1898), 78 L. T. 566; *In the Goods of Kingwell* (1899), 81 L. T. 461 (an outstanding day).

(*p*) *In the Goods of Berry*, [1907] 2 I. R. 209.

(*q*) *In the Goods of Williams* (1859), cited 31 L. J. (P. M. & A.) 40, n.; *In the Goods of Winstone*, [1898] P. 143.

(*r*) *In the Goods of Donovan* (1898), 78 L. T. 567; *In the Goods of Leman*, [1898] P. 215.

(*s*) *In the Goods of Tréfond*, [1899] P. 247.

(*t*) *In the Goods of Somerset* (1867), L. R. 1 P. & D. 350.

(*a*) Probate Rules (Non-Contentious), 1862, r. 30.

(*b*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 81. The bond must be

power to dispense with a bond (*c*). In the case of general letters of administration, the bond is conditional upon the doing of four things, (1) making or causing to be made, when lawfully called upon, a true and perfect inventory of all the estate which by law devolves to and vests in the personal representative of the intestate, so far as it may come to the hands, possession or knowledge of the administrator, or of anyone on his behalf, and exhibiting the inventory in the principal probate registry; (2) well and truly administering the estate; (3) making or causing to be made a just and true account of the administration whenever required by law so to do; and (4) delivering up the letters of administration in the event of a will being brought in for probate (*d*).

Conditions: (i.) Generally.

457. Where a general grant is committed to a creditor of an intestate, a further condition is inserted that the creditor is not to prefer his own debt and that he will pay the debts of others rateably (*e*).

(ii.) When administration committed to creditor.

458. The bond must be attested by an officer of the principal registry, or by a district registrar, or by a commissioner for oaths, but in no case by the solicitor or agent of the party who executes it (*f*). In the case of a limited or special grant the bond should be prepared in the registry (*g*).

Attestation.

459. The penalty of the bond is double the gross amount of the personal estate and double the annual value of the real estate, if any, for which the grant is obtained, but the amount may be reduced by the court or registrar (*h*). Where an estate has been partly administered, upon a further bond being required, the estate may be sworn at its then value, and the bond be limited to double that value (*i*). Where the gross estate for which the grant is

Penalty.

given to the court; the forms used declare the applicant to become bound to the President of the Probate, Divorce, and Admiralty Division.

(*c*) *In the Goods of Powis* (1864), 34 L. J. (P. M. & A.) 55. The Treasury Solicitor is exempt from the obligation to give a bond (Treasury Solicitor Act, 1876 (39 & 40 Vict. c. 18), s. 2), as are also the solicitor for the Duchy of Lancaster (Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 81, and the Public Trustee (Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 11 (4)).

(*d*) In the case of particular grants, the bond varies according to the circumstances. The usual conditions of the bond are not altered in the case of a grant being made to an attorney (*In the Goods of Goldsborough* (1859), 1 Sw. & Tr. 295).

(*e*) Under the old form of bond, which provided that the creditor should not unduly prefer his own debt, it was held that he might retain his own debt as against other debts of equal degree (*Davies* v. *Parry*, [1899] 1 Ch. 602; *Re Belham, Richardes* v. *Yates*, [1901] 2 Ch. 52, C. A.). The word "unduly" is now omitted from the condition.

(*f*) Probate Rules (Non-Contentious), 1862, r. 38.

(*g*) *Ibid.*, r. 40. In the case of a general grant a printed copy of the usual form is generally used.

(*h*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 82; Probate Rules (Non-Contentious), 1862, r. 39; and direction of the President of the Probate Division, February, 1898. For cases in which the amount has been reduced, see *In the Goods of Gent* (1858), 1 Sw. & Tr. 54; *In the Goods of Stacpoole* (1861), 2 Sw. & Tr. 316; *In the Goods of Fozard* (1863), 3 Sw. & Tr. 173; *In the Goods of Paxton* (*A.*), *In the Goods of Bennison* (*D.*), *In the Goods of Bennison* (*H.*) (1889), 14 P. D. 40.

(*i*) *In the Goods of Halliwell* (1885), 10 P. D. 198; *In the Goods of Oakey*, [1896] P. 7.

SECT. 7. **The Administrator's Bond.**

obtained, as shown in the oath, exceeds £100, a stamp, value 5*s.*, must be impressed on the bond (*k*).

SUB-SECT. 2.—*Sureties.*

Discretion of court as to requiring sureties.

460. The court has a discretion as to requiring sureties to the bond (*l*). The practice is not to dispense with sureties (*m*), except where the administrator is a public official (*n*), a nominee of a Government department (*o*), a trustee in bankruptcy who has given security as trustee (*p*), or where the property is in court (*q*).

In all cases two sureties are required, unless the administrator be the husband of the intestate or his representative (*r*), or unless the estate is under the value of £50 (*s*), in either of which cases one surety is sufficient. The sureties execute the bond.

Foreign sureties.

461. The court may authorise the security to be made up of any number of bonds (*t*), but it refuses to discharge the original sureties and allow others to be substituted for them (*a*). The sureties must be responsible persons (*b*). A married woman is accepted as a surety, but she must show separate estate equal to the value of the personalty and the annual value of the realty. Solicitors' clerks and accountants are not accepted at the principal registry. The administrator of a foreign subject resident abroad may be allowed to give a bond with foreign sureties if it is proved by affidavit that the intestate left no debts in England; in all other cases sureties resident in the United Kingdom, Channel Islands or Isle of Man are required, unless a judge at chambers otherwise orders (*c*).

(*k*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Schedule. Certain near relatives of soldiers and sailors, who die on active service, are exempt from this provision (*ibid.*). See also titles BONDS, Vol. III., p. 105; REVENUE.

(*l*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 81.

(*m*) *In the Goods of Earle* (1885), 10 P. D. 196.

(*n*) *In the Goods of Cope* (1890), 15 P. D. 107; *In the Goods of Unwin* (1902), 87 L. T. 749; *In the Estate of Causton*, [1906] P. 124.

(*o*) *In the Estate of Bryan*, [1905] P. 88.

(*p*) *In the Estate of Astbury* (1899), 80 L. T. 296.

(*q*) *In the Goods of Cleverly*, *Cleverly* v. *Gladdish* (1862), 2 Sw. & Tr. 335; *In the Goods of De la Farque* (1862), 2 Sw. & Tr. 631; *In the Goods of Wilcocks* (1892), 67 L. T. 528; *In the Goods of Leach* (1899), 80 L. T. 170; for special cases, see *In the Goods of Paton*, [1901] P. 188; *In the Goods of Cory*, [1903] P. 62; *In the Goods of Rushworth* (1908), 25 T. L. R. 128; *In the Estate of Harper*, [1909] P. 88.

(*r*) Probate Rules (Non-Contentious), 1862, r. 39.

(*s*) Probate Rules (Non-Contentious), 1863, r. 45.

(*t*) *In the Goods of Earle*, *supra.*

(*a*) *In the Goods of Stark* (1866), L. R. 1 P. & D. 76; see *In the Goods of Cowardin* (1902), 86 L. T. 261, for right of a surety, whose proposed co-surety has refused to execute the bond, to have the bond cancelled.

(*b*) Probate Rules (Non-Contentious), 1862, r. 41; and see *Carpenter* v. *Queen's Proctor* (1882), 7 P. D. 235. The administrator will be allowed a payment made to a surety where he could not otherwise have obtained reliable security (*Re Lucas*, *Parr* v. *Blair*, [1900] 1 I. R. 292). A guarantee society is accepted. The bond is sealed by the society and an affidavit showing the financial position of the society must be filed at the registry.

(*c*) Direction of the President of the Probate Division of 10th May, 1893; see the footnote to *In the Goods of Scott*, [1895] P. 342. For cases in which foreign sureties were allowed, see *In the Goods of Fernandez* (1879), 4 P. D. 229; *In the Goods of De Beaufort*, [1893] P. 231.

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462. The court has a further discretion as to requiring the sureties to justify (*d*), and the sureties must justify in cases where (1) the grant has been obtained in default of the appearance of a person with a prior right cited, but not personally served with a citation, or (2) a grant is obtained for the use and benefit of a lunatic or person of unsound mind by any person other than the committee (*e*). The sureties may also be required to justify on the application of a next of kin (*f*) or legatee (*g*) to the extent of the applicant's interest. They are required to justify in cases of presumed death, and of grants made *pendente lite* or under the discretion of the court. Creditors are not entitled as a rule to require the sureties to justify, but this practice will be departed from where a strong case is made out (*h*). Justification of sureties.

A person who desires to obtain an order for justifying security should enter a caveat, and, when warned, enter an appearance and apply by summons to a registrar (*i*). Procedure.

463. It is not contrary to public policy that the sureties should be indemnified by the next of kin (*k*). Indemnity.

SUB-SECT. 3.—*Remedies upon the Bond.*

464. Where the condition of the bond has been broken, the court may order it to be assigned; the assignee named in the order is entitled to sue on the bond as though it had been originally given to him, and to recover as trustee for all persons interested the full amount recoverable in respect of any breach (*l*). In case of breach bond assigned.

465. The application for the assignment is made by summons, which should be served on the administrator, returnable before a registrar against the sureties to show cause why the bond should not be assigned; the summons may be adjourned to the judge. The application is not a proceeding in an action (*m*). An order for assignment is made where the court is satisfied that the application is *bonâ fide*, that a *primâ facie* case of a breach is made out, and that the applicant is the proper person to sue (*n*). Where two bonds have been given, proceedings may not be taken against the sureties to the first until proceedings on the second have been disposed of (*o*). Applications for assignment of bond.

466. A breach of the condition to well and truly administer is committed if the administrator applies and converts to his own use the effects of the intestate so that they are entirely lost to the estate (*p*), or where he distributes the whole property What constitutes a breach.

(*d*) A surety required to justify makes an affidavit that he is solvent to the amount of half the penalty of the bond; see also p. 207, *ante*.
(*e*) Probate Rules (Non-Contentious), 1862, r. 42.
(*f*) *Coppin* v. *Dillon* (1833), 4 Hagg. Ecc. 361, 376; *Jackson* v. *Jackson and Jackson* (1886), L. R. 1 P. & D. 12.
(*g*) *Pickering* v. *Pickering* (1828), 1 Hag. Ecc. 480.
(*h*) *Hughes* v. *Cook* (1753), 1 Lee, 386; *John* v. *Bradbury* (1866), L. R. 1 P. & D. 245.
(*i*) See Tristram & Coote, Probate Practice, 14th ed., p. 86.
(*k*) *Blake* v. *Bayne*, [1908] A. C. 371, P. C.
(*l*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 83.
(*m*) *In the Goods of Cartwright* (1876), 1 P. D. 422.
(*n*) *In the Goods of Young* (1866), L. R. 1 P. & D. 186.
(*o*) *In the Goods of Irving* (1869), L. R. 1 P. & D. 658.
(*p*) *Canterbury* (*Archbishop*) v. *Robertson* (1833), 1 Cr. & M. 690, 712.

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without making provision for the payment of a legacy payable at a future date (*q*); but there is no breach if the administrator, without notice that his intestate was an undischarged bankrupt, distributes the effects amongst the next of kin before the intervention of the trustee in bankruptcy of the intestate (*r*). In suing on the bond the plaintiff may show other breaches than those alleged by him upon obtaining the assignment (*s*). There is no breach where loss arises from the conduct of an administrator who has fully administered and is managing the estate as the agent of the next of kin (*t*).

Fraud.

Where letters of administration are obtained by fraud and subsequently revoked, the sureties are nevertheless liable for the defaults of the fraudulent administrator committed while the letters remained unrevoked (*a*).

Statutory protection.

The sureties are entitled to rely upon the statutory protection afforded to an administrator who issues proper advertisements for claims and demands against the estate (*b*).

SECT. 8.—*The Effect of a Grant.*

Effect of grant conclusive as to validity of will or intestacy.

467. Probate and letters of administration with a will annexed are conclusive evidence of the *factum* and validity of the will (*c*); similarly letters of administration are conclusive of the intestacy of the deceased (*d*). Without the consent of the Probate Division, no other court can take notice of the right of representation to the personal estate of a deceased person, and when the Probate Division has established the right no other court can permit it to be gainsaid (*e*). So long as letters of administration are outstanding, no person may act as executor of the deceased (*f*).

Not conclusive as to collateral matters.

468. The sentence of the Probate Division is, however, conclusive only of the right directly determined and not of any collateral matter (*g*). It is not conclusive of the domicil of the deceased (*h*), nor

(*q*) *Dobbs* v. *Brain*, [1892] 2 Q. B. 207, C. A.

(*r*) *Re Bennett, Ex parte Official Receiver*, [1907] 1 K. B. 149. As to what dealings with a bankrupt's estate, prior to the intervention of the trustee in bankruptcy, are valid against the latter, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 164 *et seq.*

(*s*) *Canterbury (Archbishop)* v. *Robertson* (1832), 1 Cr. & M. 181.

(*t*) *Blake* v. *Bayne*, [1908] A. C. 371, P. C., following *Cooper* v. *Cooper* (1874), L. R. 7 H. L. 53.

(*a*) *Debendra Nath Dutt* v. *Administrator-General of Bengal* (1908), 99 L. T. 68, P. C.

(*b*) *Newton* v. *Sherry* (1876), 1 C. P. D. 246. For the statutory protection, see p. 243, *post*.

(*c*) *Whicker* v. *Hume* (1858), 7 H. L. Cas. 124; *Re Barrance, Barrance* v. *Ellis*, [1910] 2 Ch. 419; see also title EVIDENCE, Vol. XIII., pp. 512, 554.

(*d*) *Tourton* v. *Flower* (1735), 3 P. Wms. 369.

(*e*) *A.-G.* v. *Partington* (1864), 3 H. & C. 193, 204, Ex. Ch.; *Whyte* v. *Rose* (1842), 3 Q. B. 493, 507, Ex. Ch.; *Logan* v. *Fairlie* (1825), 2 Sim. & St. 284; *Tyler* v. *Bell* (1837), 2 My. & Cr. 89; *Price* v. *Dewhurst* (1838), 4 My. & Cr. 76, 81; *Bond* v. *Graham* (1842), 1 Hare, 482; *Lasseur* v. *Tyrconnel* (1846), 10 Beav. 28. The case of *M'Mahon* v. *Rawlings* (1848), 16 Sim. 429, as reported, appears incapable of explanation.

(*f*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 75.

(*g*) *Blackham's Case* (1709), 1 Salk. 290.

(*h*) *Whicker* v. *Hume, supra*, at p. 144; *Bradford* v. *Young* (1884), 26 Ch. D. 656; *Concha* v. *Concha* (1886), 11 App. Cas. 541.

is it strictly even *primâ facie* evidence of his death (*i*). But where administration has been granted to a person as the next of kin of an intestate, the Chancery Division refuses to try the question whether in fact the administrator is of kin to him or not (*k*), and where the decision of the Probate Division in an action for administration has turned upon the question which of the parties is next of kin, that decision is conclusive upon that question in a subsequent action in the Chancery Division between the same parties for distribution (*l*), but would not be so against a person who was neither a party to nor bound by the probate proceedings (*m*).

Jurisdiction to declare grantee a trustee when grant obtained by fraud.

469. Even after a grant of probate the courts have full jurisdiction to decide that the will is a forgery (*n*), and where probate has been obtained by a fraud practised upon the next of kin, a court of equity has jurisdiction to declare the wrong-doer a trustee in respect of such probate (*o*), but it cannot set aside a will which has been admitted to probate, on the ground of fraud practised upon the testator (*p*), nor ought it to declare a person who has fraudulently obtained a benefit under the will a trustee for the person defrauded (*q*).

No equitable jurisdiction to set aside proved will obtained by fraud.

For what purpose a court may look at the original will.

470. A court of equity has power to look at the original will for the purpose of construing it (*r*), even though the probate copy be in facsimile (*s*); but it is not entitled to look at the original will with a view to correcting an inaccuracy in the probate copy (*t*). Probate granted as of a will and codicil is conclusive of the fact of two instruments, though written on the same paper (*a*).

(*i*) *Moons* v. *De Bernales* (1826), 1 Russ. 301, 307; *Allen* v. *Dundas* (1789), 3 Term Rep. 125, 129. The grant has, under exceptional circumstances, been admitted as evidence of death (see *French* v. *French* (1755), 1 Dick. 268; *Loyd* v. *Finlayson* (1797), 2 Esp. 564).

(*k*) *Re Ivory, Hankin* v. *Turner* (1878), 10 Ch. D. 372, C. A.

(*l*) *Barrs* v. *Jackson* (1845), 1 Ph. 582.

(*m*) *Mohan* v. *Broughton*, [1900] P. 56, C. A., *per* LINDLEY, M.R., at p. 58; see, too, *Long* v. *Wakeling* (1839), 1 Beav. 400.

(*n*) *Priestman* v. *Thomas* (1884), 9 P. D. 210, C. A.

(*o*) *Barnesly* v. *Powel* (1749), 1 Ves. Sen. 119, 284; *Meadows* v. *Kingston* (*Duchess*), (1775), Amb. 756, 762.

(*p*) *Gingell* v. *Horne* (1839), 9 Sim. 539; *Allen* v. *M'Pherson* (1847), 1 H. L. Cas. 191; *Meluish* v. *Milton* (1876), 3 Ch. D. 27, C. A.

(*q*) The old Court of Chancery would exercise jurisdiction in such a case, where the person defrauded had no adequate remedy in the Court of Probate; see *Allen* v. *M'Pherson*, *supra*, *per* Lord LYNDHURST, at p. 210. The Probate Division has now, as a branch of the High Court of Justice, full equitable jurisdiction, and the exercise of this jurisdiction in such cases ought to be left exclusively to that court; see *Meluish* v. *Milton*, *supra*, *per* JAMES, L.J., at p. 33.

(*r*) *Compton* v. *Bloxham* (1845), 2 Coll. 201; *Re Harrison, Turner* v. *Hellard* (1885), 30 Ch. D. 390, C. A. The court may look at the foreign original, even where only an English translation has been proved (*Re Cliff's Trusts*, [1892] 2 Ch. 229).

(*s*) *Shea* v. *Boschetti* (1854), 18 Beav. 321.

(*t*) *Oppenheim* v. *Henry* (1853), 9 Hare, 802, n. (b) to *Walker* v. *Tipping* (1852), 9 Hare, 800; see, too, *Havergal* v. *Harrison* (1843), 7 Beav. 49; and *Gann* v. *Gregory* (1854), 3 De G. M. & G. 777.

(*a*) *Baillie* v. *Butterfield* (1787), 1 Cox, Eq. Cas. 392

SECT. 8. The Effect of a Grant.

Grant to one enures for all.

471. Probate granted to one of several executors enures for the benefit of all (*b*). Accordingly an executor who has not proved may join in bringing an action with one who has (*c*), and upon the death of the one who has proved the others may represent the testator without further probate (*d*).

Effect of grant upon real estate.

472. In the case of death on or since the 1st January, 1898, all enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real apply to the real estate (*e*) of the deceased, so far as the same are applicable (*f*); probate is, therefore, conclusive evidence, in respect of such real estate, of the *factum* and validity of the will, and letters of administration of the intestacy of the deceased. The title of the devisee or heir-at-law is consequently established by production of a common form grant, coupled with evidence of the death of the deceased and of the assent of or conveyance by the personal representative.

Where probate in common form not binding.

473. In the case of death before the 1st January, 1898, probate in common form is not binding upon the heir-at-law or upon any party interested or claiming to be interested in the testator's real estate (*g*). In the case of death, whether before or after the 1st January, 1898, it is not binding in respect of land of copyhold tenure or customary freehold where an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant. In such cases, too, letters of administration are no evidence that the deceased died intestate.

How probate may be rendered admissible as evidence to establish a devise under the old law.

In these cases probate in common form is not even admissible as evidence to establish a devise in an action, unless the person who seeks to rely upon it gives the opposite party ten days' notice at least before the hearing that he intends to give it in evidence as proof of the devise, and the opposite party does not within four days after receipt of the notice give a counter-notice that he disputes the validity of the devise (*h*). Should the opposite party fail to give such a counter-notice, the probate becomes *primâ facie* evidence of the devise, but the opposite party is not precluded thereby from adducing evidence to show that the will is invalid (*i*).

(*b*) *Webster* v. *Spencer* (1820), 3 B. & Ald. 360; *Watkins* v. *Brent* (1835), 7 Sim. 512.

(*c*) *Brookes* v. *Stroud* (1702), 1 Salk. 3; *Walters* v. *Pfeil* (1829), Mood. & M. 362.

(*d*) *Cummins* v. *Cummins* (1845), 3 Jo. & Lat. 64.

(*e*) Real estate, for this purpose, does not include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant (Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1 (4)); but it includes equitable estates in land of copyhold or customary freehold tenure (*Re Somerville and Turner's Contract*, [1903] 2 Ch. 583).

(*f*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 2 (2), where see the proviso as to several joint representatives; see also titles DESCENT AND DISTRIBUTION, Vol. XI.; REAL PROPERTY AND CHATTELS REAL.

(*g*) See Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 64.

(*h*) *Ibid.*

(*i*) *Barraclough* v. *Greenhough* (1867), L. R. 2 Q. B. 612, Ex. Ch.

SECT. 8. The Effect of a Grant.

Effect of probate in solemn form.

474. Where probate of the will has been obtained in solemn form, or its validity otherwise declared in proceedings to which the heir-at-law, devisees, and other persons having or pretending interest in the real estate affected by the will have been cited or summoned, the probate or decree enures for the benefit of all persons interested in such real estate; and the probate copy of the will, or the letters of administration with the will annexed, or a copy thereof, when sealed, are to be received in all courts and in all actions and proceedings affecting the deceased's real estate (except proceedings by way of appeal from the order making the grant or for revocation) as conclusive evidence of the validity and contents of the will, in the same manner as a probate is evidence in matters relating to a testator's personal estate (*j*).

Effect of decree refusing probate.

475. Where probate is refused or revoked on the ground of the invalidity of the will, or its invalidity is otherwise declared by judgment or order, the judgment or order enures for the benefit of the heir-at-law or other persons against whose interest in the real estate the will might operate, and the will is not to be received in evidence in any action or proceedings in relation to the real estate, except in proceedings by way of appeal from the judgment or order (*k*).

When will proves itself.

476. In cases in which it may still be necessary to give a will in evidence in support of title, it should be remembered that a will thirty years old produced from the proper custody proves itself (*l*). The age of the will is reckoned from the date of its execution, not from the date of the testator's death (*m*).

SECT. 9.—*Revocation of Grants of Probate and Letters of Administration.*

SUB-SECT. 1.—*When and how a Grant may be revoked.*

Grounds for revocation.

477. A grant may be revoked where it has been obtained upon a false suggestion, whether made fraudulently (*n*) or in ignorance: it may also be revoked where it subsequently becomes inoperative or

(*j*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), ss. 61, 62; see also title EVIDENCE, Vol. XIII., p. 512.

(*k*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), ss. 61, 62. The probate, decree, or order of the court is not in any case to affect the heir, or any person in respect of his interest in real estate, unless such heir or person has been cited or made a party to the proceedings, or derives title through or under a person so cited or made party (*ibid.*, s. 63).

(*l*) *Man* v. *Ricketts* (1844), 7 Beav. 93. The attesting witnesses are presumed after the lapse of thirty years to be dead (*Doe* d. *Ashburnham* (*Lord*) v. *Michael* (1851), 15 Jur. 677); see also title EVIDENCE, Vol. XIII., p. 511.

(*m*) *Man* v. *Ricketts*, *supra*.

(*n*) The general rule, that a judgment obtained by fraud can be set aside only as against the person who committed or procured the fraud, does not apply to an action to set aside a judgment granting probate of a will, inasmuch as the will must be either good or bad as against all the world (*Birch* v. *Birch*, [1902] P. 130, C. A.); see also title JUDGMENTS AND ORDERS.

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useless, or where if allowed to subsist it would prevent the due administration of the estate.

False suggestion.

Thus a grant obtained on the false suggestion that the person entitled thereto is dead (*o*), or by a woman claiming to be the relict of the deceased, but who was not, in fact, legally married (*p*), or by illegitimate relatives or impostors (*q*), or by the elected guardian of a minor where there is a testamentary guardian (*r*), or by the next of kin where there is a valid residuary bequest (*s*), may be revoked. A grant of probate of the will of a living person will be revoked (*t*).

When subsequent will or codicil discovered.

Where a will has been discovered after a grant of letters of administration or a later will after a grant of probate, or where the grant has been made pending a caveat (*a*), the original grant will be revoked. A codicil discovered subsequently to a grant of probate, if it does not vary the appointment of executors, may be proved alone; if it does vary the appointment, the original grant must be revoked. Where a codicil is discovered subsequent to a grant of administration with the will annexed, the original grant must be revoked (*b*).

A grant made *per incuriam* or containing a wrong surname of the deceased must be revoked.

When required for better administration of estate.

478. The grant may be revoked where the executor or administrator becomes incapable of acting by reason of insanity or ill-health (*c*); where a creditor administrator has disappeared (*d*), or is desirous of retiring (*e*) after completely settling his own debt; or where the administrator, whether creditor, widow, or next of kin, has disappeared (*f*); the real object which the court always keeps in view being the due and proper administration of the estate and the interest of the parties beneficially entitled thereto (*g*). A general grant ought not to be revoked upon the application of an administrator who has intermeddled with the estate (*h*), and only on strong grounds where he has not intermeddled (*i*). The grant may in the above cases be revoked at the instance of a creditor (*j*).

(*o*) *Harrison* v. *Weldon* (1731), 2 Stra. 911.

(*p*) *In the Goods of Moore* (1845), 3 Notes of Cases, 601; *In the Goods of Langley* (1851), 2 Rob. Eccl. 407.

(*q*) *In the Goods of Bergman* (1842), 2 Notes of Cases, 22.

(*r*) *In the Goods of Morris* (1862), 2 Sw. & Tr. 360.

(*s*) *Warren* v. *Kelson* (1859), 1 Sw. & Tr. 290.

(*t*) *In the Goods of Napier* (1809), 1 Phillim. 83.

(*a*) *Offley* v. *Best* (1666), 1 Lev. 186.

(*b*) Tristram & Coote, Probate Practice, 14th ed., p. 180.

(*c*) See also p. 199, *ante*.

(*d*) *In the Goods of Jenkins* (1819), 3 Phillim. 33; *In the Goods of Bradshaw* (1887), 13 P. D. 18.

(*e*) *In the Goods of Hoare* (1833), cited in 2 Sw. & Tr. 361, n.

(*f*) *In the Goods of Covell* (1889), 15 P. D. 8; *In the Goods of Loveday*, [1900] P. 154.

(*g*) *In the Goods of Loveday*, *supra*, at p. 156.

(*h*) *In the Goods of Reid* (1886), 11 P. D. 70, C. A.

(*i*) *In the Goods of Heslop* (1846), 1 Rob. Eccl. 457. In a special case probate was revoked on the application of the grantee, a married woman, on the ground of difficulties with regard to the transfer of stock (*Meeke and Donald* v. *Curteis* (1827), 1 Hag. Ecc. 127, 129).

(*j*) *In the Estate of French*, [1910] P. 169.

Limited grants.

479. A limited grant may be revoked in favour of the assignee of the interest to which the grant was limited (*k*); a grant limited to carrying on proceedings in Chancery ought not, while still in force, to be revoked in order that a general grant may issue; it should be supplemented by a *cæterorum* grant (*l*).

Executor ought not to apply for revocation.

480. An executor who has obtained probate is not entitled to take steps to have the grant revoked, nor to cite the persons interested under the will to propound it in solemn form. He may propound it himself in solemn form, and then give notice to the legatees or devisees that it is to be opposed, and that he does not intend to take steps to support it unless he is guaranteed his costs (*m*).

Probate in common form granted by consent cannot afterwards be revoked on proof that the conditions on which it was granted have not been complied with, unless it was procured by fraud or circumvention (*n*).

Manner of obtaining revocation.

481. Revocation may be obtained either voluntarily or by compulsory proceedings. In the former case evidence is filed setting out the circumstances, and the order may be made on motion (*o*) or by a registrar. In the latter case a writ is issued, and a citation is served upon the grantee requiring him to bring the grant into the principal registry, and show cause why it should not be revoked. The citation must either precede or be simultaneous with the writ, and the plaintiff should allege in the indorsement of his claim on the writ and in his statement of claim, as the ground for revoking the grant, the invalidity of the will or the defendant's want of interest.

Remission of action.

482. The Probate Division has power to remit actions for revocation in a proper case to the county court (*p*).

Stay.

An action for revocation which is groundless and vexatious ought to be stayed (*q*).

Cancellation of revoked grant.

The revoked grant must be produced and delivered to the registrar at the time of its revocation, so that it may be cancelled in the registry.

SUB-SECT. 2.—*Effect of Revocation.*

Effect of revocation.

483. All payments *bonâ fide* made to an executor or administrator under a grant which is subsequently revoked constitute a legal discharge to the person making the payment, and the executor or administrator may retain and reimburse himself in respect of any

(*k*) *In the Goods of Ferrier* (1828), 1 Hag. Ecc. 241.
(*l*) *In the Goods of Brown* (1872), L. R. 2 P. & D. 455. As to *cæterorum* grants, see p. 170, *ante*.
(*m*) *In the Goods of Chamberlain* (1867), L. R. 1 P. & D. 316.
(*n*) *Nicol* v. *Askew* (1837), 2 Moo. P. C. C. 88.
(*o*) *In the Goods of Bergman* (1842), 2 Notes of Cases, 22. As to motions, see p. 157, *ante*.
(*p*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 54, repealed and extended by Court of Probate Act, 1858 (21 & 22 Vict. c. 95), ss. 11, 12; see title COUNTY COURTS, Vol. VIII. pp. 644 *et seq.*
(*q*) *Mahon* v. *Quinn*, [1904] 2 I. R. 267.

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payments made by him which the person to whom probate or administration is afterwards granted might have lawfully made (*r*).

Payments made *bonâ fide* upon grant.

484. Persons and corporations making or permitting to be made *bonâ fide* any payment or transfer upon any probate or letters of administration are entitled to be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of such probate or letters of administration (*s*).

Revocation of temporary grants not to affect legal proceedings.

Revocations of temporary grants do not prejudice legal proceedings commenced before the revocation by or against the temporary administrator (*t*).

Distinction between voidable and void grants.

485. With regard to the dealings by the holder of the grant with the deceased's effects, a distinction exists between the cases where the grant is voidable only, and where it is void *ab initio*. A grant of administration is voidable only where administration has been committed either to a person who was not the person entitled by the recognised law of priorities to administer or without citing the necessary parties. A grant of administration is void *ab initio* where there was in fact a will of the deceased in existence containing the appointment of an executor: the existence of a will not containing an appointment of an executor does not render a grant of letters of administration void *ab initio* (*a*).

Effect of revocation of voidable grant.

Where the grant is voidable only, the dealings by an administrator with the deceased's effects stand good, notwithstanding a subsequent revocation of the grant (*b*).

Effect of revocation of void grant.

Where the grant is void *ab initio* dispositions of the assets by the supposed administrator are, speaking generally, also void, on the ground that the assets are vested in the executor from the death, the supposed administrator having no property in them and no power of dealing with them (*c*). An assurance by the supposed administrator confers no title even in the case of a purchase for value (*d*). It would appear that the fact that the supposed administrator has applied the proceeds of a voluntary sale in the payment of the funeral expenses or debts of the deceased in due course of administration would not validate the assurance, the only act which holds good being one which the supposed administrator was compellable to do (*e*). The purchaser however, would,

(*r*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 77.

(*s*) *Ibid.*, s. 78.

(*t*) *Ibid.*, s. 76.

(*a*) *Boxall* v. *Boxall* (1884), 27 Ch. D. 220. As to the effect of a revocation of an Indian grant, see *Craster* v. *Thomas*, [1909] 2 Ch. 348.

(*b*) *Packman's Case* (1595), 6 Co. Rep. 18 b; *Blackborough* v. *Davis* (1702), 1 P. Wms. 40, 43; *Boxall* v. *Boxall*, *supra*.

(*c*) *Ellis* v. *Ellis*, [1905] 1 Ch. 613, *per* WARRINGTON, J., at p. 617.

(*d*) *Graysbrook* v. *Fox* (1565), 1 Plowd. 275; *Abram* v. *Cunningham* (1677), 2 Lev. 182; *Woolley* v. *Clark* (1822), 5 B. & Ald. 744.

(*e*) *Ellis* v. *Ellis*, *supra*. The statement in the head-note to this case that the dispositions of the assets by the supposed administrator are void "except acts done in a due course of administration" does not appear to be borne out by the judgment, though it has the direct support of the second portion of the head-note to *Graysbrook* v. *Fox*, *supra*. This portion of the head-note to *Graysbrook* v. *Fox* is founded upon the *dictum* of WALSH, J., at p. 282; the essence of that *dictum*, according to WARRINGTON, J., in *Ellis* v. *Ellis*, *supra*, at

it is conceived, be entitled to stand in the place of the creditor whose debt has been discharged out of his money, and claim a lien on the property purchased to the extent of the debt discharged (*f*).

SECT. 9. Revocation of Grants etc.

Where an administration judgment or order has been made in an action brought by a person whose grant is subsequently revoked, an order may be obtained to stay all further proceedings in the action (*g*), or on appeal the action may be dismissed or the order or judgment may be reversed (*h*).

Part III.—The Interest of the Representative in the Deceased's Property.

SECT. 1.—*Personal Estate and Chattels Real.*

SUB-SECT. 1.—*In General.*

486. The interest which a personal representative has in the goods of a deceased person differs from the ordinary interest which a person has in his own goods, inasmuch as the representative holds them merely in right of the deceased (*i*).

The interest of the representative is in right of the deceased.

On the bankruptcy of the representative the property of the deceased does not pass to the trustee in bankruptcy (*k*), but the creditors of the testator or intestate may by their conduct in permitting the representative to employ the assets in his business preclude themselves from claiming them as against the creditors of the representative (*l*). Where the representative is also residuary legatee the court will assist his trustee in bankruptcy to get in the deceased's assets (*m*).

Effect of bankruptcy of the representative.

A lease which comprises a provision for forfeiture upon the bankruptcy of the lessee, his executors, administrators or assigns, is forfeited upon the bankruptcy of the representative of the lessee (*n*).

The property of a testator or intestate is not liable to be taken in execution under a judgment against his representative personally (*o*),

Right of judgment creditor of the representative.

p. 619, is that the act in question was one which the administrator was compellable to do.

(*f*) See *Ellis* v. *Ellis*, [1905] 1 Ch. 613, *per* WARRINGTON, J., at p. 619.

(*g*) *Houseman* v. *Houseman* (1876), 1 Ch. D. 535, C. A. As to judgments and orders in general, see title JUDGMENTS AND ORDERS.

(*h*) *Re Dean, Dean* v. *Wright* (1882), 21 Ch. D. 581, C. A.

(*i*) Went. Off. Ex., 14th ed., p. 192.

(*k*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44; *Kitchen* v. *Ibbetson* (1873), L. R. 17 Eq. 46, 49; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 176.

(*l*) *Fox* v. *Fisher* (1819), 3 B. & Ald. 135; *Kitchen* v. *Ibbetson, supra*; see, too, *Re Thomas* (1842), 1 Ph. 159.

(*m*) *Ex parte Butler* (1749), 1 Atk. 211.

(*n*) *Doe* d. *Bridgman* v. *David* (1834), 1 Cr. M. & R. 405; see, generally, title LANDLORD AND TENANT.

(*o*) *Farr* v. *Newman* (1792), 4 Term Rep. 621; *M'Leod* v. *Drummond* (1810), 17 Ves. 152, *per* Lord ELDON, L.C., at p. 168; *Gaskell* v. *Marshall and Poland* (1831), 1 Mood. & R. 132; *Kinderley* v. *Jervis* (1856), 22 Beav. 1, *per* ROMILLY, M.R., at p. 23.

SECT. 1. Personal Estate and Chattels Real.

unless the representative has converted the assets to his own use (*p*), or unless, from lapse of time and an enjoyment of the assets inconsistent with the trusts of the will, an inference may be raised of a gift of the property by the deceased's creditors or beneficiaries to the representative (*q*).

Merger.

487. Inasmuch as the representative holds the assets not in his own right, but in a fiduciary capacity, there is no merger of an estate held by the representative as such in an estate which he holds in his own right (*r*).

Money or choses in action not subject to seizure.

488. The statutory power (*s*) of a sheriff to seize money and choses in action of the judgment debtor under a writ of *fieri facias* does not create a lien or charge upon the money or choses in action, and cannot be exercised after the death of the judgment debtor (*t*).

Special property in goods transmissible.

489. The right of an undischarged bankrupt to hold goods acquired after bankruptcy until the intervention of the trustee in bankruptcy is one which is transmissible to his representative (*a*).

SUB-SECT. 2.—*Chattels.*

Chattels which savour of realty.

490. The general rule is that all movable chattels devolve upon the personal representative of the owner (*b*); but there are certain chattels which are so closely annexed to the inheritance that they accompany the land, and accordingly where the land does not vest in the legal personal representative they pass to the heir or devisee. Deer in a park or fish in a pond are chattels of such a nature (*c*).

Similarly, heirlooms accompany the inheritance, whether they pass by special custom, such as the best bed or the like, or whether they savour of the inheritance. In the latter class are included title deeds and the chest or box in which they are usually kept, the patent creating a dignity, the garter and collar of a knight, an ancient horn where the tenure is by cornage, and the ancient jewels of the Crown (*d*).

Emblements.

491. Conversely, whether the land vests in the legal personal representative or not, certain produce of the soil passes as personal estate to him. Where the occupier of land, whether he be the owner of the inheritance or of an estate determining with his

(*p*) *Quick* v. *Staines* (1798), 1 Bos. & P. 293; distinguished in *Gaskell* v. *Marshall and Poland* (1831), 1 Mood. & R. 132.

(*q*) *Ray* v. *Ray* (1815), Coop. G. 264; *Re Morgan, Pillgrem* v. *Pillgrem* (1881), 18 Ch. D. 93, C. A.

(*r*) 2 Bl. Com. 177; *Re Radcliffe, Radcliffe* v. *Bewes*, [1892] 1 Ch. 227, C. A.

(*s*) Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 12.

(*t*) *Johnson* v. *Pickering*, [1908] 1 K. B. 1, C. A. As to a writ of *fi. fa.*, see title EXECUTION, p. 37, *ante*.

(*a*) *Fyson* v. *Chambers* (1842), 9 M. & W. 460. As to this right of an undischarged bankrupt, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 164.

(*b*) Godolphin, Orphan's Legacy, Part I., c. 13.

(*c*) 2 Bl. Com. 428.

(*d*) *Hill* v. *Hill*, [1897] 1 Q. B. 483, C. A., *per* CHITTY, L.J., at p. 494; Co. Litt. 18 b; see also title REAL PROPERTY AND CHATTELS REAL.

own life (*e*), has sown or planted the soil with a view to raising a crop, and dies before harvest time, his personal representatives are entitled to the profits of the crop as compensation for the labour and expense of tilling, manuring, and sowing the land (*f*). These profits are called emblements. The right extends to a crop of that species only which ordinarily repays the labour by which it is produced within the year within which that labour is bestowed, though the crop may in extraordinary seasons be delayed beyond that period (*g*). Where there is a right to emblements there is also a right of entry to gather them (*h*), but the person exercising the right must show that, on entry, the crop was ripe or fit for harvesting, or that it needed care or cultivation (*i*).

Right of entry.

The right of the executor to emblements does not extend against a devisee of the land (*k*), unless there are words in the will showing an intention that the executor shall have the emblements (*l*).

492. The natural products of the soil devolve with the land, unless they have been actually severed in the lifetime of the deceased owner, or have been granted to him separately from the land (*m*). To cut down ornamental trees or timber, except in the case of estates which are cultivated merely for the produce of saleable timber and where the timber is cut periodically (*n*), or except in accordance with a prevailing local usage (*o*), is an act of waste on the part of a limited owner, such as a tenant for life. Accordingly on the death of such owner such trees or timber, whether cut down or blown down in his lifetime (*p*), or the proceeds of sale thereof, devolve upon the owner of the first estate of inheritance, or upon the trusts of the settlement, and not upon the representatives of the limited owner (*q*).

Natural products of the soil.

SUB-SECT. 3.—*Widow's Paraphernalia.*

493. It may be doubted whether, having regard to the Married Women's Property Act, 1882 (*r*), the doctrine of paraphernalia any longer exists, except perhaps in regard to valuable articles given by

(*e*) The right extends to the representative of a tenant in dower; see Statute of Merton (1235-6) 20 Hen. 3, c. 2.

(*f*) 2 Bl. Com. pp. 122, 403; *Lawton* v. *Lawton* (1743), 3 Atk. 13, 16; and see, generally, title AGRICULTURE, Vol. I., p. 282.

(*g*) *Graves* v. *Weld* (1833), 5 B. & Ad. 105, 118.

(*h*) *Kingsbury* v. *Collins* (1827), 4 Bing. 202.

(*i*) *Hayling* v. *Okey* (1853), 8 Exch. 531, 545, Ex. Ch.

(*k*) *Cooper* v *Woolfitt* (1857), 2 H. & N. 122.

(*l*) *West* v. *Moore* (1807), 8 East 339; *Cox* v. *Godsalve* (1699), 6 East, 604, n. A gift of stock upon a farm is sufficient to pass the emblements; see *Re Roose, Evans* v. *Williamson* (1880), 17 Ch. D. 696, following *West* v. *Moore, supra*, and *Cox* v. *Godsalve, supra*, and disapproving *Vaisey* v. *Reynolds* (1828), 5 Russ. 12.

(*m*) Went. Off. Ex., 14th ed., p. 147; *Re Ainslie, Swinburn* v. *Ainslie* (1885), 30 Ch. D. 485, C. A.

(*n*) *Honywood* v. *Honywood* (1874), L. R. 18 Eq. 306, 309.

(*o*) *Dashwood* v. *Magniac*, [1891] 3 Ch. 306, 357, C. A.

(*p*) *Herlakenden's Case* (1589), 4 Co. Rep. 62 a, 63 b.

(*q*) *Bewick* v. *Whitfield* (1734), 3 P. Wms. 267; *Ormonde* (*Marquis*) v. *Kynnersley* (1830), cited 15 Beav. 10; also reported 7 L. J. (o. s.) (CH.) 150 and 8, L. J. (o. s.) (CH.) 67; *Lushington* v. *Boldero* (1851), 15 Beav. 1; see also title SETTLEMENTS.

(*r*) 45 & 46 Vict. c. 75.

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a husband to his wife subject to express conditions (*s*). Subject to this doubt the rules applicable to this doctrine are as follows:—

"*Bona paraphernalia.*"

494. Apparel or ornaments given by a husband to a wife, suitable to her rank or station in life, for the purpose of being worn by the wife, and not as an absolute gift to her, are known as *bona paraphernalia* (*a*). The question whether the ornaments are an absolute gift to the wife or are merely intended for her personal decoration is, in the absence of apt words accompanying the gift, one to be determined on all the facts of the case (*b*).

Husband's power of alienation.

495. The husband may alien his wife's paraphernalia in his lifetime, but, if he merely pledge them, the wife may upon his death call upon his executors to redeem them if his personal estate is sufficient for the purpose after payment of his debts (*c*).

Liability for husband's debts.

The paraphernalia are not liable to satisfy the husband's legacies (*d*), but are liable to his creditors if there are not assets at his death sufficient for payment of his debts (*e*), nor are they to be allowed to the widow, even though contingent assets subsequently fall in (*f*).

Pin money.

496. An allowance by the husband to the wife for dress, or for the purchase of ornaments, or for her private expenditure is commonly called "pin money" (*g*). The representative of the wife is not entitled to claim any arrears of pin money against the husband (*h*); nor can the wife herself claim more than one year's arrears against her husband or his estate (*i*).

SUB-SECT. 4.—*Fixtures.*

Ornamental and trade fixtures are an exception.

497. The general maxim of the law is that whatever is annexed to land becomes part of the land (*k*): but upon this maxim certain exceptions have been engrafted in respect of both ornamental and trade fixtures (*l*), and these exceptions become of importance in cases where the person who has affixed the chattel

(*s*) *Masson, Templier & Co.* v. *De Fries*, [1909] 2 K. B. 831, C. A. In this case FARWELL, L.J., seems to have considered the doctrine of paraphernalia as obsolete, but the other judges did not express a definite opinion on the point; see also title HUSBAND AND WIFE.

(*a*) 2 Bl. Com. 436.

(*b*) *Tasker* v. *Tasker*, [1895] P. 1.

(*c*) *Graham* v. *Londonderry* (*Lord*) (1746), 3 Atk. 393.

(*d*) *Tipping* v. *Tipping* (1721), 1 P. Wms. 729; *Northey* v. *Northey* (1740), 2 Atk. 77; *Seymore* v. *Tresilian* (1737), 3 Atk. 358; *Snelson* v. *Corbet* (1746), 3 Atk. 369.

(*e*) *Tyrrel's* (*Lady*) *Case* (1674), Freem. (K. B.) 304; *Campion* v. *Cotton* (1810), 17 Ves. 264.

(*f*) *Burton* v. *Pierpoint* (1722), 2 P. Wms. 78.

(*g*) The nature of pin money is discussed by Lord BROUGHAM, L.C., in *Howard* v. *Digby* (1834), 2 Cl. & Fin. 634, H. L.; and see title HUSBAND AND WIFE.

(*h*) *Howard* v. *Digby*, *supra*.

(*i*) *Ibid.*; but see *Tuffnell* v. *O'Donoghue*, [1897] 1 I. R. 360, as to the rights of a mortgagee of the wife's pin money.

(*k*) *Holland* v. *Hodgson* (1872), L. R. 7 C. P. 328, Ex. Ch., *per* BLACKBURN, J., at p. 344.

(*l*) *Elliott* v. *Bishop* (1854), 10 Exch. 496, *per* MARTIN, B., at p. 507; *Dudley* (*Lord*) v. *Warde* (*Lord*) (1751), Amb. 113; *Lawton* v. *Lawton* (1743), 3 Atk. 13; see also title LANDLORD AND TENANT.

had only a life interest in the property to which the chattel has been affixed.

Right of representative of tenant for life as against remainderman.

498. With a view to ascertaining whether the legal personal representative, of a tenant for life who has annexed a chattel to the freehold, is entitled to remove that chattel as against the remainderman, both the degree and the object of the annexation must be considered. There need not be an inquiry into the motive of the person who annexed the chattel, but the object and purpose of the annexation are to be inferred from the circumstances of the case (*m*). Where from the nature of the chattel it is evident that it has been affixed to the freehold for the purpose of ornamentation and for its better enjoyment as a chattel (*n*), or has been affixed as machinery to the freehold for the purpose of trade, it passes to, and is removable by, the representative, and does not devolve with the freehold to the remainderman (*o*).

Right of executor of owner in fee as against heir or devisee.

499. But on the death of an owner in fee simple, there is no reason in the nature of things why as between his executor and his heir, or devisee, the former should take rather than the latter (*p*). Accordingly, in such a case, chattels, whether affixed for trade purposes (*q*) or for the purpose of ornamentation (*r*), devolve with the land to which they are affixed.

SUB-SECT. 5.—*Partnership Property.*

Dissolution of partnership upon death.

500. The right of survivorship ordinarily incident to a joint tenancy does not apply in the case of partners (*s*). Subject to any agreement between the partners, a partnership is dissolved as regards all the partners by the death of any partner (*t*). Mutual covenants by partners that they and their respective executors and administrators shall continue partners cannot be specifically enforced against the representatives of a deceased partner, and if they refuse to continue the partnership, it will be dissolved as from the death of their testator (*a*), but his estate is liable for damages in respect of the breach of contract (*b*).

Right to have business wound up.

501. The representatives of a deceased partner are, in the absence of any agreement between the partners, entitled to have

(*m*) *Re De Falbe, Ward* v. *Taylor*, [1901] 1 Ch. 523, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 535; affirmed, *sub nom. Leigh* v. *Taylor*, [1902] A. C. 157.

(*n*) *Re De Falbe, Wood* v. *Taylor, supra*, disapproving *D'Eyncourt* v. *Gregory* (1866), L. R. 3 Eq. 382, and explaining *Norton* v. *Dashwood*, [1896] 2 Ch. 497.

(*o*) *Re Hulse* (*Sir Edward*) (*Bart.*), *Beattie* v. *Hulse*, [1905] 1 Ch. 406.

(*p*) *Ibid.*, *per* BUCKLEY, J., at p. 410.

(*q*) *Bain* v. *Brand* (1876), 1 App. Cas. 762.

(*r*) *Re Whaley, Whaley* v. *Roebuck*, [1908] 1 Ch. 615.

(*s*) Co. Litt. 182 a; *Jeffereys* v. *Small* (1684), 1 Vern. 217; see, also, title DESCENT AND DISTRIBUTION, Vol. XI., p. 7; and see also titles PARTNERSHIP; PERSONAL PROPERTY; REAL PROPERTY AND CHATTELS REAL.

(*t*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 33 (1). Death does not operate as a dissolution of a limited partnership (Limited Partnerships Act, 1907 (7 Edw. 7, c. 24), s. 6 (2)).

(*a*) *Downs* v. *Collins* (1848), 6 Hare, 418.

(*b*) *Ibid.*

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the partnership business wound up and disposed of, and may apply to the court to enforce this right (*c*).

Lien of representatives upon the surplus assets of partnership.

502. Unless there is something in the partnership articles to the contrary, the surviving partner has not only the right, but the duty to realise the partnership property, and for the purposes of that realisation to carry on the business if it is necessary to do so (*d*). The representatives of a deceased partner have a general lien upon the surplus assets of the partnership in respect of their deceased partner's interest in the partnership, but they have no lien on any specific asset, whether personalty or realty, such as would fetter its realisation or conversion into money by the surviving partner (*e*).

Amount due is a debt as from the date of deceased partner's death.

503. Subject to any agreement between the partners, the amount due from the surviving partners to the representatives of a deceased partner in respect of the deceased partner's share is a debt accruing at the date of death (*f*).

SUB-SECT. 6.—*Property the Subject of a General Power of Appointment.*

Effect of exercise of power.

504. Where a person by his will exercises a general power of appointment over property, whether personal or real, the property becomes assets for the payment of his debts, and the only person entitled to receive the same is his legal personal representative (*g*).

Discharge by legal personal representative.

The legal personal representative can give a valid discharge for the property without proving the existence of any debts, and although the fund is largely in excess of all the testator's debts. If he misapplies the fund, he (and not the trustees who have paid it over to him) is liable (*h*).

For the purpose of death duties (*a*), personal estate over which a general power of appointment has been exercised passes to the

(*c*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 39. As to the rights of the representative in the case of the carrying on of the partnership business without settling accounts, and the accountability of partners for private profits, see title PARTNERSHIP.

(*d*) *Re Bourne, Bourne* v. *Bourne*, [1906] 2 Ch. 427, C. A.

(*e*) *Ibid.*; see, too, *Re Langmead's Trusts* (1855), 20 Beav. 20; affirmed on appeal, 7 De G. M. & G. 353, C. A., and *Payne* v. *Hornby* (1858), 25 Beav. 280. As to the devolution of goodwill and of leaseholds held by the partnership, see title PARTNERSHIP. As to goodwill, see also title TRADE AND TRADE UNIONS.

(*f*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 43. S. 44 of the Act provides rules which, subject to any agreement, are to be observed in settling accounts between partners after a dissolution. As to proof in the bankruptcy of surviving partners, see title BANKRUPTCY, Vol. II., p. 221, and, in addition to the cases there cited, see *Re Joseph and Bergel's Deed of Assignment, Pears* v. *Bergel* (1908), 100 L. T. 74.

(*g*) *Fleming* v. *Buchanan* (1853), 3 De G. M. & G. 976, C. A.; *Re Hoskin's Trusts* (1877), 6 Ch. D. 281, C. A.; *Beyfus* v. *Lawley*, [1903] A. C. 411; *Re Hadley, Johnson* v. *Hadley*, [1909] 1 Ch. 20, C. A.; see, too, *Re Guedalla, Lee* v. *Guedalla's Trustees*, [1905] 2 Ch. 331. The Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1, provides for the vesting in the personal representative of real estate over which a person executes by will a general power of appointment. As to powers generally, see title POWERS.

(*h*) *Re Hadley, Johnson* v. *Hadley, supra, per* FARWELL, L.J., at p. 35.

(*a*) See title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., pp. 219 *et seq.*

executor as such, and in his hands is legal assets for the payment of debts (*b*).

The testator cannot by his will create a charge as against his general creditors upon the fund in favour of a particular creditor (*c*), although he may have contracted to do so.

Effect of appointment by a married woman.

505. In the case of a married woman the execution of a general power by will has the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is liable (*d*). The property appointed is, however, under no greater liability than her separate estate, and accordingly in the case of a debt or liability incurred by a married woman on or prior to the 5th December, 1893 (*e*), it rests with the creditor to show that, at the time of incurring the obligation, the married woman was possessed of separate property with respect to which she must be deemed to have entered into the contract (*f*). In the case of a contract entered into by a married woman after the 5th December, 1893, the property appointed is liable, irrespective of the possession of separate property at the date of the contract (*g*).

Administrator with will annexed.

506. An administrator with the will annexed has the same right as an executor to receive and give a valid discharge for property over which the testator has exercised a general power of appointment (*h*).

SUB-SECT. 7.—*Donationes Mortis Causâ.*

Donatio mortis causâ.

507. A *donatio mortis causâ* is a singular form of gift; it is a gift which is neither entirely *inter vivos* nor testamentary. It is a gift *inter vivos* by which the donee is to have the absolute title to the subject of the gift, not at once, but if the donor dies. If the donor dies the title becomes absolute, not under, but as against his executor (*i*). In order to render such gift effectual three circumstances must combine: first, the gift must be made in contemplation, though not necessarily in expectation, of death;

(*b*) *Re Hadley, Johnson* v. *Hadley*, [1909] 1 Ch. 20, C. A., overruling *Re Treasure, Wild* v. *Stanham*, [1900] 2 Ch. 648; *Re Maddock, Llewellyn* v. *Washington*, [1901] 2 Ch. 372; *Re Power, Re Stone, Acworth* v. *Stone*, [1901] 2 Ch. 659, and *Re Dodson*, [1907] 1 Ch. 284; and following *Re Moore, Moore* v. *Moore*, [1901] 1 Ch. 691; *Re Dixon, Penfold* v. *Dixon*, [1902] 1 Ch. 248; *Re Fearnsides, Baines* v. *Chadwick*, [1903] 1 Ch. 250; and *Re Orlebar, Wynter* v. *Orlebar*, [1908] 1 Ch. 136.

(*c*) *Beyfus* v. *Lawley*, [1903] A. C. 411.

(*d*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 4; *Re Hoskin's Trusts* (1877), 6 Ch. D. 281, C. A. As to the separate estate of married women generally, see title HUSBAND AND WIFE.

(*e*) The day on which the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), came into force.

(*f*) *Re Fieldwick, Johnson* v. *Adamson*, [1909] 1 Ch. 1, C. A., overruling *Re Ann, Wilson* v. *Ann*, [1894] 1 Ch. 549.

(*g*) Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 1. The contract must be entered into for the first time after the passing of the Act; an acknowledgment of a debt existing before the Act is not sufficient (*Re Wheeler, Hankinson* v. *Hayter*, [1904] 2 Ch. 66).

(*h*) *Re Peacock's Settlement, Kelcey* v. *Harrison*, [1902] 1 Ch. 552.

(*i*) *Re Beaumont, Beaumont* v. *Ewbank*, [1902] 1 Ch. 889, *per* BUCKLEY, J., at

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secondly, there must be delivery to the donee of the subject-matter of the gift; and thirdly, the gift must be made in circumstances showing that it is to take effect only if the death of the donor follows (*a*).

Equity assists a donee.

508. A *donatio mortis causâ* does not vest in the representative of the donor (*b*), and in the case of a gift of this nature, as opposed to a gift *inter vivos*, the court, by the application of equitable principles, assists the donee to perfect his title; it regards a good *donatio mortis causâ* as raising by operation of law a trust (*c*). The donee is accordingly entitled to call upon the donor's representatives to lend him their name, or to give him their indorsement, in order that he may complete his title (*d*).

How the gift may be established.

509. The gift may be established upon the uncorroborated evidence of the donee himself, if that evidence is not shown to be inaccurate in any material point, and the judge is satisfied of its truthfulness (*e*).

Liability to death duties.

510. A *donatio mortis causâ* is liable to legacy duty (*f*) and estate duty (*g*). It is also liable to the debts of the donor in case of a deficiency of assets (*h*).

Probate unnecessary.

Probate of a *donatio mortis causâ* is unnecessary, as it requires no act by the representative to vest it in the donee, and, though revocable by resumption of possession by the donor, it is not revoked by a subsequent will, though it may be satisfied by a legacy (*i*).

SUB-SECT. 8.—*Choses in Action accruing in the Lifetime of the Deceased.*

Rights in choses in action etc.

511. Rights of action founded upon a debt or a breach of a contractual obligation (*k*), or upon a statutory duty to be performed in favour of the deceased (*l*), pass to his representative, even though

p. 892. If the donor recovers, the donee is a trustee for him (*Staniland* v. *Willott* (1852), 3 Mac. & G. 664).

(*a*) *Cain* v. *Moon*, [1896] 2. Q. B. 283, *per* Lord RUSSELL OF KILLOWEN, C.J., at p. 286. A gift made in contemplation of suicide is invalid (*Agnew* v. *Belfast Banking Co.*, [1896] 2 I. R. 204, C. A.). For *donationes mortis causâ* generally, see title GIFTS.

(*b*) *Tate* v. *Hilbert* (1793), 2 Ves. 111.

(*c*) *Duffield* v. *Elwes* (1827), 1 Bli. (N. S.) 497, H. L., *per* Lord ELDON, at p. 543.

(*d*) *Re Beaumont, Beaumont* v. *Ewbank*, [1902] 1 Ch. 889, *per* BUCKLEY, J., at p. 894; see, too, *Re Dillon, Duffin* v. *Duffin* (1890), 44 Ch. D. 76, *per* COTTON, L.J., at p. 82.

(*e*) *Re Dillon, Duffin* v. *Duffin*, *supra*, *per* COTTON, L.J., at p. 80; *Re Farman, Farman* v. *Smith* (1887), 58 L. T. 12.

(*f*) Revenue Act, 1845 (8 & 9 Vict. c. 76), s. 4.

(*g*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (c); and see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 187.

(*h*) *Tate* v. *Hilbert* (1793), 2 Ves. 111, 120; *Tait* v. *Leithead* (1854), Kay, 658.

(*i*) *Jones* v. *Selby* (1710), Prec. Ch. 300; *Hudson* v. *Spencer*, [1910] 2 Ch. 285; see, also, title EQUITY, Vol. XIII., p. 130.

(*k*) *Beckham* v. *Drake* (1849), 2 H. L. Cas. 579, *per* WILLIAMS, J., at p. 597. Writs of account were given to executors by the Statute of Westminster II. (1285), 13 Edw. 1, stat. 1, c. 23, to executors of executors by stat. (1351) 25 Edw. 3, stat. 5, c. 5, and to administrators by stat. (1357) 31 Edw. 3, stat. 1, c. 11. As to devolution in the case of a chose in action, see also title CHOSES IN ACTION, Vol. IV., p. 399.

(*l*) *Peebles* v. *Oswaldtwistle Urban District Council*, [1896] 2 Q. B. 159, C. A.

he be not named as a party entitled to the benefit of the obligation or duty. But where the contract is founded upon personal considerations, as in the case of principal and agent, or of master and servant, the death of either party puts an end to the relation, and in respect of service after the death the contract is dissolved, unless there be a stipulation expressed or implied to the contrary (*m*).

Breach of promise of marriage.

512. In the case of breach of promise of marriage, an action cannot be maintained by the representative of the promisee, unless special damage to the property of the promisee can be averred (*n*); nor in the converse case can such an action be maintained by the promisee against the representative of the promisor in the absence of special damage to the property of the promisee (*o*); the special damage must be of a nature to bring it within the ordinary rules as to remoteness of damages (*p*).

Covenants relating to land.

513. Where the deceased person's real estate is not vested in his personal representative, the heir or devisee is the proper person to bring an action for breach of covenant relating to such estate, even though committed during the deceased's lifetime, if the ultimate damage accrues after the ancestor's death (*q*). But the personal representative can, even where the real estate is not vested in him, maintain an action for breach of such a covenant, where damage accrued in the lifetime of the deceased, whether the covenant is one that runs with the land (*r*) or is merely collateral (*s*), but in the latter case he can only sue the original covenantor, and not an assign of the latter (*t*).

see, too, *Darlington* v. *Roscoe & Sons*, [1907] 1 K. B. 219, C. A.; *United Collieries, Ltd.* v. *Simpson*, [1909] A. C. 383, dissenting from *O'Donovan* v. *Cameron, Swan & Co.*, [1901] 2 I. R. 633; but not where the statutory duty involves a personal confidence in the deceased (*James* v. *Morgan*, [1909] 1 K. B. 564).

(*m*) *Farrow* v. *Wilson* (1869), L. R. 4 C. P. 744; see also *Beckham* v. *Drake* (1849), 2 H. L. Cas. 579, *per* PARKE, B., at p. 625, for the statement that executors cannot sue upon a contract the breach of which is a mere personal wrong; and *Wilson* v. *Harper*, [1908] 2 Ch. 370, for the right of executors to recover commission in respect of business done with customers introduced by their testator. As to assignment of contractual rights by operation of law, generally, see title CONTRACT, Vol. VII., p. 502. For the rights of an apprentice on the death of a master, see *R.* v. *Peck* (1698), 1 Salk. 66; *Cooper* v. *Simmons* (1862), 7 H. & N. 707, and in the case of parish apprentices, Parish Apprentices Act, 1792 (32 Geo. 3, c. 57), s. 2; see also p. 305, *post;* and for apprentices generally, see title MASTER AND SERVANT. As to devolution of rights in case of death of employer or contractor, see also title BUILDING CONTRACTS, ENGINEERS AND ARCHITECTS, Vol. III., p. 273. A publishing agreement between an author and a publisher is of a personal nature (*Stevens* v. *Benning* (1854), 1 K. & J. 168; see also *Reade* v. *Bentley* (1857), 3 K. & J. 271; *Hole* v. *Bradbury* (1879), 12 Ch. D. 886; *Griffith* v. *Tower Publishing Co., Ltd., and Moncrieff*, [1897] 1 Ch. 21).

(*n*) *Chamberlain* v. *Williamson* (1814), 2 M. & S. 408.

(*o*) *Finlay* v. *Chirney* (1888), 20 Q. B. D. 494, C. A.

(*p*) *Finlay* v. *Chirney, supra, per* BOWEN, L.J., at p. 507. For measure of damages, see title DAMAGES, Vol. X., pp. 331—346.

(*q*) *Kingdon* v. *Nottle* (1813), 1 M. & S. 355; *King* v. *Jones* (1814), 5 Taunt. 418.

(*r*) *Morley* v. *Polhill* (1689), 2 Vent. 56; *Smith* v. *Simonds* (1687), Comb. 64.

(*s*) *Raymond* v. *Fitch* (1835), 2 Cr. M. & R. 588.

(*t*) *Formby* v. *Barker*, [1903] 2 Ch. 539, C. A.

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Negligence in the performance of a contract.

514. Where the relationship between two parties, as in the case of a solicitor and client (*a*) or of a common carrier and a passenger (*b*), lays upon one party a duty to display care and diligence, failure to display such care and diligence may be treated as a breach of contract, and the damages arising therefrom to the estate of the injured party survive to his representatives.

Right of representative to exercise power of selection.

515. Where a person at his death was entitled out of several chattels to take his choice of one or more for his own use, his representative may claim by election (*c*), but if nothing passed to the deceased person before his election, it ought to have been made in his lifetime (*d*). Similarly, where there is a lease to a person of several acres, parcel of a larger number of acres, and the lessee dies before making an election, his representative may make it (*e*).

Right to exercise option to take shares.

516. The representatives of a member of a limited company, being entitled to the privileges as well as to the burdens of membership, may, so long as the name of the deceased member remains on the register, claim to avail themselves of an offer of new shares made to the members of the company during the lifetime of the deceased member (*f*).

Right of representative of a landlord tenant for life to charge for compensation.

517. The representatives of a landlord tenant for life who have been compelled to pay compensation for improvements to an outgoing tenant, who had claimed compensation and whose tenancy had been determined before the death of the landlord, are entitled to a charge upon the holding in respect of the amount which they have so paid (*g*).

Actions *ex delicto*.

518. The general rule of law is that rights of action for merely personal injuries do not survive the injured party (*h*); but his personal representative can maintain an action for any damage done to the personal estate in his lifetime, whereby it has become less beneficial to such representative (*i*). Thus he can maintain an action for deceit, where the estate has incurred a loss owing to

(*a*) *Knights* v. *Quarles* (1820), 2 Brod. & Bing. 102. In *Wilson* v. *Tucker* (1822), 3 Stark. 154, judgment went against the representatives of a negligent solicitor.

(*b*) *Bradshaw* v. *Lancashire and Yorkshire Rail. Co.* (1875), L. R. 10 C. P. 189; followed in *Leggott* v. *Great Northern Rail. Co.* (1876), 1 Q. B. D. 599. In the head-note to the latter case it is stated that the former case was questioned; the head-note is not accurate in this respect, and the former case has been referred to without disapprobation by Lord HALSBURY, L.C., in *No. 7 Steam Sand Pump Dredger (Owners)* v. *S.S. Greta Holme (Owners)*, *The Greta Holme*, [1897] A. C. 596, at p. 601.

(*c*) Toller, Law of Executors, p. 173.

(*d*) *Ibid.*; Co. Litt. 145 a; Com. Dig. Election (B).

(*e*) *Jones* v. *Cherney* (1680), Freem. (K. B.) 530.

(*f*) *James* v. *Buena Ventura Nitrate Grounds Syndicate, Ltd.*, [1896] 1 Ch. 456, C. A.; see also title COMPANIES, Vol. V., p. 197.

(*g*) *Re Agricultural Holdings (England) Act*, 1883, *Gough* v. *Gough*, [1891] 2 Q. B. 665, C. A.; Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 15; and see title AGRICULTURE, Vol. I., pp. 259, 267.

(*h*) *Chamberlain* v. *Williamson* (1814), 2 M. & S. 408, *per* Lord ELLENBOROUGH, C.J., at p. 415; see, generally, title ACTION, Vol. I.

(*i*) By stat. (1330) 4 Edw. 3, c. 7, s. 4, actions of trespass to their testator's goods and chattels were given to executors; the remedy was extended to the

the deceit (*k*), for slander of title to a trade mark (*l*), or for an injunction and damages in respect of the infringement of a trade mark (*m*); but he cannot maintain an action for personal injury to the deceased, even though the deceased may have been put to expense by reason of such injury (*n*).

Personal injuries causing death.

519. Where the personal injuries have been the cause of death, certain exceptions have been engrafted by various statutes upon the common law rule that actions for personal injuries do not survive. These statutory exceptions are dealt with elsewhere (*o*).

Injury to the deceased's real estate.

520. Executors or administrators can maintain an action for any injury to real estate committed in the lifetime of the deceased owner, and for which he might have maintained an action, provided that the injury was committed within six calendar months before the death of such owner, and that the action is brought within one year after his death; the damages, when recovered, form part of the personal estate (*p*). If the action has been commenced in the lifetime of the deceased, his representatives, upon his death, have a right to continue the action (*q*).

Apportioned parts of rents and other periodical payments.

521. Where rents or other periodical payments in the nature of income, to an apportioned part of which the deceased was entitled at his death, have been recovered and received by a person other than the deceased's legal personal representative, the latter may recover the apportioned part due to the estate against such other person (*r*).

Unpublished literary works.

522. The copyright in a book which is first published after its author's death belongs to the proprietor of the manuscript from which the book is first published (*s*); but the common law right of an author to restrain publication of his unpublished works devolves upon his personal representatives (*a*).

Unpatented inventions.

523. Where a person claiming to be the inventor of an invention dies without making application for a patent, the application may

executors of executors by stat. (1351), 25 Edw. 3, stat. 5, c. 5, and to administrators by equitable construction of the statutes (*Tharpe* v. *Stallwood* (1843), 5 Man. & G. 760, *per* TINDAL, C.J., at p. 773). These statutes have been extended to all torts, except those relating to the testator's freehold, and those where the injury done is of a personal nature (*Twycross* v. *Grant* (1878), 4 C. P. D. 40, C. A., *per* BRAMWELL, L.J., at p. 45).

(*k*) *Twycross* v. *Grant*, *supra*.

(*l*) *Hatchard* v. *Mège* (1887), 18 Q. B. D. 771.

(*m*) *Oakey & Sons* v. *Dalton* (1887), 35 Ch. D. 700.

(*n*) *Pulling* v. *Great Eastern Rail. Co.* (1882), 9 Q. B. D. 110; *Lendon* v. *London Road Car Co.* (1888), 4 T. L. R. 448.

(*o*) See titles MASTER AND SERVANT; NEGLIGENCE.

(*p*) Civil Procedure Act (3 & 4 Will. 4, c. 42), s. 2.

(*q*) *Jones* v. *Simes* (1890), 43 Ch. D. 607.

(*r*) Apportionment Act, 1870 (33 & 34 Vict. c. 35), s. 4.

(*s*) Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 3; see also title COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., pp. 137 *et seq.* Where more than one manuscript exists, the owner of the manuscript from which the work is first published is entitled to the copyright (*Macmillan & Co.* v. *Dent*, [1907] 1 Ch. 107, C. A.).

(*a*) *Macmillan & Co.* v. *Dent*, *supra*, at p. 129.

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be made by, and the patent granted to, his legal personal representative (*b*). The application must contain a declaration by the representative that he believes the deceased to be the true and first inventor (*c*).

Time runs notwithstanding death.

524. Where a cause of action has accrued to a person during his life, time continues to run under the Statutes of Limitation notwithstanding his death (*d*).

Death of party to action.

525. Where the cause of action survives, an action does not abate by reason of the death of any of the parties; and whether the cause of action survives or not, there is no abatement by reason of the death of either party between the verdict and the judgment, but judgment may be entered notwithstanding the death (*e*). The representatives of a deceased plaintiff can obtain an order *ex parte* to carry on the proceedings (*f*), but they become personally liable for all the costs of the action *ab initio* (*g*). Where a sole plaintiff or defendant dies, the other party may, in the case of a cause of action which survives, apply that the party entitled to proceed shall proceed, and in default of his proceeding may obtain judgment to be entered (*h*). The court has also jurisdiction in case of death to order the personal representative to be made a party or to be served with notice (*i*), and to make orders to carry on proceedings (*k*).

Money paid into court.

526. The court has jurisdiction to order money paid into court in an action by a defendant to be paid out to the representative of a plaintiff who has died (*l*), or to the plaintiff when the defendant has died (*m*), notwithstanding that in either case the action may have abated by reason of the death of the party.

In case of divorce proceedings.

527. The personal representative of a person who has obtained a decree *nisi* for the dissolution of his marriage cannot revive the suit for the purpose of making the decree absolute (*n*); nor after

(*b*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 43 (1).

(*c*) *Ibid.*, s. 43 (2). S. 37 of the Act provides that for the purpose of the devolution of the legal interest joint patentees are to be treated, unless otherwise specified in the patent, as joint tenants, but the beneficial interest, subject to any contract to the contrary, is to devolve on the personal representatives as part of the personal estate. As to patents, generally, see title PATENTS ETC.

(*d*) *Hickman* v. *Walker* (1737), Willes, 27; *Penny* v. *Brice* (1865), 18 C. B. (N. S.) 393. See Limitation Act, 1623 (21 Jac. 1, c. 16); and title LIMITATION OF ACTIONS.

(*e*) R. S. C., Ord. 17, r. 1. For the practice in county courts, see County Court Rules, Ord. 17, and title COUNTY COURTS, Vol. VIII., p. 511.

(*f*) R. S. C., Ord. 17, r. 4. The representative would also appear to have a right to bring a fresh action within a reasonable time after the death, notwithstanding the period of limitation had expired; see *Swindell* v. *Bulkeley* (1886), 18 Q. B. D. 250, C. A., *per* LOPES, L.J., at p. 255.

(*g*) *Boynton* v. *Boynton* (1879), 4 App. Cas. 733.

(*h*) R. S. C., Ord. 17, r. 8.

(*i*) *Ibid.*, Ord. 17, r. 2.

(*k*) *Ibid.*, Ord. 17, r. 4. The court has also power to appoint an interim receiver for the preservation of property, notwithstanding the death of a sole defendant (*Re Parker, Cash* v. *Parker* (1879), 12 Ch. D. 293; *Re Clark, Clark* v. *Clark*, [1910] W. N. 234).

(*l*) *Brown* v. *Feeney*, [1906] 1 K. B. 563, C. A.

(*m*) *Maxwell* v. *Wolseley* (*Viscount*), [1907] 1 K. B. 274, C. A.

(*n*) *Stanhope* v. *Stanhope* (1886), 11 P. D. 103, C. A.

decree absolute can the personal representative of the petitioner continue proceedings to vary the marriage settlement when there are no children of the marriage (*o*).

Death of plaintiff after judgment.

528. Where a plaintiff dies after obtaining judgment, his personal representatives may apply for leave to issue execution (*p*): until they have obtained such leave they cannot issue a bankruptcy notice against the judgment debtor (*q*).

SUB-SECT. 9.—*Choses in Action accruing subsequent to the Death.*

Injury to goods and chattels.

529. As the legal personal representative is in point of law the owner of the goods and chattels of his testator or intestate, he may maintain actions in respect of injury done to such goods or chattels, after the death of the owner, whether he has been in actual possession of them or not (*r*); and he may sue either in his individual capacity, or in his representative character (*s*).

Contracts entered into by the representative.

530. In the case of contracts the representative may sue in his representative character wherever the money, when recovered, would be assets of the deceased (*t*). Thus he may sue in his representative character for money lent by him out of the estate (*a*), for work done by him as executor (*b*), for goods supplied by him in carrying on the testator's business (*c*), or for money of the deceased wrongfully paid away by himself (*d*).

Where one of several executors has entered into a contract on his own account only, the others cannot join him in suing on the contract, even when the money recovered would be assets; but they can join where the contract was entered into by the executor on account of himself and his co-executors, or generally on account of the estate (*e*).

Death of the representative.

Where the proceeds of a contract entered into by a representative would form part of the assets of the deceased, the person entitled to sue upon the contract upon the death of the representative is

(*o*) *Thomson* v. *Thomson*, [1896] P. 263, C. A.

(*p*) R. S. C., Ord. 42, r. 23. The appointment of a receiver is not execution within the meaning of this rule (*Re Shephard, Atkins* v. *Shephard* (1889), 43 Ch. D. 131, C. A.; *Norburn* v. *Norburn*, [1894] 1 Q. B. 448). Representatives who desire the appointment of a receiver should first apply for an order to carry on proceedings under R. S. C., Ord. 17, r. 4 (see *Re Clements, Ex parte Clements*, [1901] 1 K. B. 260); see also title EXECUTION, p. 124, *ante*.

(*q*) *Re Woodall, Ex parte Woodall* (1884), 13 Q. B. D. 479; and see title BANKRUPTCY AND INSOLVENCY, Vol. I., p. 25.

(*r*) *Hollis* v. *Smith* (1808), 10 East, 293.

(*s*) *Adams* v. *Cheverel* (1606), Cro. Jac. 113.

(*t*) *Abbott* v. *Parfitt* (1871), L. R. 6 Q. B. 346.

(*a*) *Webster* v. *Spencer* (1820), 3 B. & Ald. 360.

(*b*) *Edwards* v. *Grace* (1836), 2 M. & W. 190.

(*c*) *Abbott* v. *Parfitt, supra;* see, too, *Aspinall* v. *Wake* (1833), 10 Bing. 51. But where the representative, being also the beneficiary, is carrying on the business in his own interest, he cannot sue in his representative character (*Bolingbroke* v. *Kerr* (1866), L. R. 1 Exch. 222, as explained in *Abbott* v. *Parfitt, supra*).

(*d*) *Clark* v. *Hougham* (1823), 2 B. & C. 149.

(*e*) *Heath* v. *Chilton* (1844), 12 M. & W. 632, explaining *Webster* v. *Spencer, supra*, on this point.

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the representative of the original deceased, *e.g.*, the administrator *de bonis non* of an intestate (*f*).

Limitation of actions.

531. Where a cause of action in respect of a person's personal estate and effects first accrues after his death, time does not begin to run, if he has died intestate, until an administrator has been appointed (*g*): but an administrator claiming the estate or interest of his intestate must be deemed to claim as if there had been no interval of time between the death and the grant of letters of administration (*h*); and the same rule would apparently apply in the case of real estate which is vested in him by statute (*i*). As against the executor time runs in all cases from the accruer of the cause of action.

SUB-SECT. 10.—*Chattels Real.*

Leaseholds.

532. The vesting of a term of years in the deceased's personal representative is a conclusion of law (*k*); the executor who accepts the office cannot waive the term (*l*). The vesting, being a conclusion of law, is not an assignment within a clause in a lease restraining assignment (*m*).

The interest of a yearly tenant is transmissible to his personal representative (*n*), and notice to quit must be given to him (*o*). A lease for years made to a parson, bishop, or other corporation sole and his successors, goes to the personal representative and not to the successors of the corporation sole (*p*).

Next presentations.

533. Where a benefice becomes void and the person seized of the advowson dies before presentment, the right to the next presentation goes to his personal representative and not to his heir (*q*), whether the patron was seized of the advowson in his natural capacity, or in a politic capacity as a prebendary (*r*). Prior to the abolition of

(*f*) *Moseley* v. *Rendell* (1871), L. R. 6 Q. B. 338.

(*g*) *Cary* v. *Stephenson* (1694), 2 Salk. 421; *Murray* v. *East India Co.* (1821), 5 B. & Ald. 204; *Burdick* v. *Garrick* (1870), 5 Ch. App. 233; *Chan Kit San* v. *Ho Fung Hang*, [1902] A. C. 257, P. C. If a creditor dies intestate on the day a debt becomes payable to him, and there is no evidence to show whether he died before or after the moment when the debt became payable, the statute does not begin to run against his administrator until letters of administration have been taken out (*Atkinson* v. *Bradford Third Equitable Benefit Building Society* (1890), 25 Q. B. D. 377, C. A.).

(*h*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 6; *Re Williams, Davies* v. *Williams* (1886), 34 Ch. D. 558 (claim to chattels real); *Re Bonsor and Smith's Contract* (1884), 34 Ch. D. 560, n. (claim to a legacy). See also, on this subject generally, title LIMITATION OF ACTIONS.

(*i*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65); see also title CONFLICT OF LAWS, Vol. VI., p. 218.

(*k*) *Ackland* v. *Pring* (1841), 2 Man. & G. 937. As to the liability of the representative for rent, see p. 306, *post*; see also title LANDLORD AND TENANT.

(*l*) *Billinghurst* v. *Speerman* (1695), 1 Salk. 297.

(*m*) *Seers* v. *Hind* (1791), 1 Ves. 294. As to such clauses generally, see title LANDLORD AND TENANT.

(*n*) *Doe* d. *Shore* v. *Porter* (1789), 3 Term Rep. 13; *James* v. *Dean* (1805), 11 Ves. 383, 393.

(*o*) *Parker* d. *Walker* v. *Constable* (1769), 3 Wils. 25.

(*p*) Co. Litt. 46 b.

(*q*) *R.* v. *Canterbury* (*Archbishop*) (1589), 4 Leon. 107, 109; see, as to benefices generally, title ECCLESIASTICAL LAW, Vol. XI., pp. 559 *et seq.*

(*r*) *Rennell* v. *Lincoln* (*Bishop*) (1827), 7 B. & C. 113; affirmed, *sub nom.* *Mirehouse* v. *Rennell* (1832), 8 Bing. 490, H. L. The only exception is in the

donative benefices the right of donation descended to the heir and not to the personal representative (*s*). If the owner of the advowson be also the incumbent, the right to the next presentation goes upon his death to his heir and not to his personal representative (*t*). If a benefice become void during the life of a husband who is tenant by the curtesy, and he die before the church is filled, the husband's executor has the turn and not the wife's heir (*a*).

SUB-SECT. 11.—*Estates pur autre vie.*

Estate *pur autre vie* not one of inheritance.

534. An estate *pur autre vie* in realty is not strictly an estate of inheritance; though it is limited to a man and his heirs, the heir takes not by descent, but as special occupant (*b*).

Alienable both *inter vivos* and by will.

The tenant of an estate *pur autre vie*, whether there be or be not a special occupant thereof, can dispose of the estate either by alienation in his lifetime (*c*) or by his will (*d*). If he does not dispose of the estate by will, the estate is chargeable in the hands of the heir, if it comes to him as special occupant, as assets by descent, as in the case of freehold land in fee simple; in case there is no special occupant, the estate, whatever be its tenure, and whether it be a corporeal or incorporeal hereditament, goes to the executor or administrator of the tenant, and is assets in his hands to be applied and distributed in the same manner as the personal estate of the testator or intestate (*e*).

There may be a special occupant of an equitable estate *pur autre vie* (*f*). If the estate is equitable there is no general occupancy pending the appointment of an administrator to the deceased tenant (*g*).

SUB-SECT. 12.—*Property of a Married Woman* (*h*).

Right of representative to get in assets.

535. Upon the death of a married woman testate, probate of her will or letters of administration with her will annexed take, as

case of a bishop (*Mirehouse* v. *Rennell* (1832), 8 Bing. 490, H. L., *per* BAYLEY, B., at p. 550); in that case the right goes to the King (2 Roll. Abr. 345).

(*s*) *Repington* v. *Tamworth School* (1763), 2 Wils. 150. Under the Benefices Act, 1898 (60 & 61 Vict. c. 48), s. 12, all donative benefices have become presentative.

(*t*) *Holt* v. *Winchester* (*Bishop*) (1683), 3 Lev. 47. It is conceived that the devolution upon the heir is not affected by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), as the void turn of a benefice is not valuable.

(*a*) Watson, Clergyman's Law, 4th ed., p. 71; see also title ECCLESIASTICAL LAW, Vol. XI., p. 585.

(*b*) *Northen* v. *Carnegie* (1859), 4 Drew. 587, *per* KINDERSLEY, V.-C., at p. 590; see also *Re Michell*, *Moore* v. *Moore*, [1892] 2 Ch. 87.

(*c*) Co. Litt. 41 b.

(*d*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 3.

(*e*) *Ibid.*, s. 6. Although applicable as personal estate, however, there is nothing in the Act to change the nature of an estate *pur autre vie* in realty from realty into personalty (*Chatfield* v. *Berchtoldt* (1872), 7 Ch. App. 192). For estate *pur autre vie* generally, see title DESCENT AND DISTRIBUTION, Vol. XI., p. 13; and see *Re Sheppard*, *Sheppard* v. *Manning*, [1897] 2 Ch. 67; *Re Inman*, *Inman* v. *Inman*, [1903] 1 Ch. 241, following *Doe* d. *Lewis* v. *Lewis* (1842), 9 M. & W. 662, distinguishing *Philpotts* d. *Philpotts* v. *James* (1784), 3 Doug. (K. B.) 425, and not following *Wall* v. *Byrne* (1845), 2 Jo. & Lat. 118, and *Re King*, *King* v. *King*, [1898] 1 I. R. 91; affirmed [1899] 1 I. R. 30, C. A.

(*f*) *Reynolds* v. *White* (1860), 2 De G. F. & J. 590.

(*g*) *Re Inman*, *Inman* v. *Inman*, *supra*.

(*h*) For married women's property generally, see titles HUSBAND AND WIFE; REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS.

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a general rule, the form of ordinary grants of probate, or letters of administration with will annexed, without any exception or limitation (*i*). The grant enables the executor or administrator with the will annexed to get in all the assets of the married woman, whether she had power to dispose of them by will or not (*k*); but the beneficial devolution of the assets which she had no power to dispose of remains unaffected, and the executor or administrator with the will annexed is a trustee of such assets for the husband (*l*). Similarly the executor of a married woman is a trustee for her husband of her undisposed-of separate personalty (*m*).

Husband obtaining probate does not assent to invalid dispositions.

536. A husband who obtains probate of his wife's will in general form is not deemed to have assented to the will as a disposition of property which she had no right to dispose of by will without his assent (*n*).

Right of administrator other than husband to get in assets.

537. Where a married woman dies intestate, her husband has a paramount title to letters of administration (*o*); if he takes them out he becomes entitled to the choses in action of his wife not reduced into possession during the coverture both at law and in equity: if he does not take them out, the legal personal representative of the wife is the proper person to get them in; but having got them in, he holds them in trust for the husband (*p*).

Jus mariti.

In case of leaseholds unaffected by the Married Women's Property Act, 1882.

Where a married woman whose marriage took place before the 1st January, 1883, dies intestate possessed of a chattel real interest, to which her title has accrued prior to the 1st January, 1883 (*q*), the chattel real vests in her husband *jure mariti* without the necessity of a grant of administration to him, even though it be an interest in reversion (*r*) or settled to her separate use (*a*). The separate use is exhausted where the wife dies without making a disposition (*b*).

In case of leaseholds affected by the Act.

Where the marriage has taken place on or since the 1st January, 1883, or the title of the wife to the chattel real interest has accrued since that date, upon her death intestate the husband must, in

(*i*) Probate Rules (Non-Contentious), 1887, rr. 15, 18.

(*k*) *Smart* v. *Tranter* (1890), 43 Ch. D. 587, C. A. As to a limited grant in respect of a will effective only as executing a power, see p. 170, *ante*.

(*l*) *Smart* v. *Tranter*, *supra*.

(*m*) *Re Lambert's Estate*, *Stanton* v. *Lambert* (1888), 39 Ch. D. 626.

(*n*) *Re Atkinson*, *Walter* v. *Atkinson*, [1899] 2 Ch. 1, C. A.

(*o*) See p. 183, *ante*.

(*p*) *Smart* v. *Tranter*, *supra*, *per* LINDLEY, L.J., at p. 597; *Squib* v. *Wyn* (1717), 1 P. Wms. 378, 381; *Humphrey* v. *Bullen* (1737), 1 Atk. 458; *Elliot* v. *Collier* (1747), 3 Atk. 526.

(*q*) The day on which the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), came into force. The title accrues when the married woman first acquires her interest in the property, whether such interest is at that time in possession, reversion, or remainder (*Reid* v. *Reid* (1886), 31 Ch. D. 402). See also titles HUSBAND AND WIFE; REAL PROPERTY AND CHATTELS REAL.

(*r*) *Re Bellamy*, *Elder* v. *Pearson* (1883), 25 Ch. D. 620.

(*a*) *Surman* v. *Wharton*, [1891] 1 Q. B. 491.

(*b*) *Cooper* v. *Macdonald* (1877), 7 Ch. D. 288, C. A., *per* JESSEL, M.R., at p. 296.

order to establish his title to her chattels real, take out administration to her estates (*c*).

SUB-SECT. 13.—*Trust and Mortgage Estates.*

Trust estates.

538. Personal estate which is vested in a sole or a last surviving trustee devolves upon his personal representatives. The latter have power to appoint new trustees in the place of the deceased trustee, whether he was the survivor of several trustees or the sole trustee (*d*), where there is no person nominated by the instrument creating the trust for the purpose of appointing new trustees, or where there is no person so nominated able and willing to act (*e*).

The representatives can, however, decline to act in the trusts (*f*), and they are under no obligation to appoint new trustees (*g*).

Statutory devolution of real trust estate.

539. Real estate vested in any person solely on any trust upon his death, notwithstanding any testamentary disposition, devolves to and becomes vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him (*h*): the representatives have the same power of disposing of the realty as if it were a chattel real, and are to be deemed in law the heirs and assigns of the trustee within the meaning of all trusts and powers (*i*).

Effect of statutory devolution.

540. The legal personal representatives are thus substituted for the heir or assign of the trustee, but they have not any powers additional to those which the heir or assign formerly had (*k*).

(*c*) Though the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), has not altered the beneficial devolution of a married woman's property undisposed of by her (see *Re Lambert's Estate, Stanton* v. *Lambert* (1888), 39 Ch. D. 626, *per* STIRLING, J., at p. 635), yet the provisions contained in ss. 1, 2, and 5 of the Act, that the married woman is to acquire, hold, and dispose of property as her separate property in the same way as if she were a *feme sole*, appear to exclude the doctrine of *jus mariti* as applicable to property coming within the Act.

(*d*) *Re Shafto's Trusts* (1885), 29 Ch. D. 247; and see, generally, title TRUSTS AND TRUSTEES.

(*e*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 10 (1). For the appointment of new trustees generally, see title TRUSTS AND TRUSTEES. Where the instrument creating the trust, either expressly or by implication, imports the provisions of Lord Cranworth's Act, stat. (1860) 23 & 24 Vict. c. 145, s. 27 (now repealed), the acting executors have power to appoint new trustees without the concurrence of those who have not proved the will (*Re Boucherett, Barne* v. *Erskine* (1907), 52 Sol. Jo. 77).

(*f*) *Legg* v. *Mackrell* (1860), 2 De G. F. & J. 551; *Re Ridley, Ridley* v. *Ridley*, [1904] 2 Ch. 774; *Re Benett, Ward* v. *Benett*, [1906] 1 Ch. 216, C. A.

(*g*) *Re Knight's (Sarah) Will* (1884), 26 Ch. D. 82, C. A.

(*h*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 30. In the absence of a personal representative the legal estate would appear to vest in the heir (*Re Pilling's Trusts* (1884), 26 Ch. D. 432).

(*i*) Under the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 5, repealed and partially re-enacted by the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 48 (since repealed by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 30), a fee simple estate vested in a bare trustee devolved upon his legal personal representatives. For judicial opinion as to the meaning of the term "bare trustee," see *Morgan* v. *Swansea Urban Sanitary Authority* (1878), 9 Ch. D. 582; *Christie* v. *Ovington* (1875), 1 Ch. D. 279; *Re Docwra, Docwra* v. *Faith* (1885), 29 Ch. D. 693; and *Re Cunningham and Frayling's Contract*, [1891] 2 Ch. 567; see also title TRUSTS AND TRUSTEES.

(*k*) *Re Ingleby Boak and Norwich Union Insurance Co.* (1883), 13 L. R. Ir. 326; *Re Crunden and Meux's Contract*, [1909] 1 Ch. 690.

SECT. 1. Personal Estate and Chattels Real.

They can, accordingly, execute the trusts only in cases in which the heir or assign could have done so. For the purpose of ascertaining whether the heir or assign could have executed a trust or a power, the test to be applied is whether the heir or assign was pointed out in the instrument creating the trust as being, in the settlor's contemplation, a person who was to execute it (*l*).

Notwithstanding that the trust estate vests in the personal representatives of the sole or last surviving trustee, a power of appointing new trustees can be validly exercised by the person in whom the power is vested under the trust; and the appointment operates to oust the personal representatives from the trust (*m*).

Mortgage estates.

541. Real estate vested by way of mortgage in any person solely also devolves upon his personal representatives (*n*). They are entitled to receive and give a good discharge for the mortgage money, and can accordingly exercise the statutory power of sale (*o*).

Effect of statutory devolution.

In the case of several mortgagees or of several transferees, where the mortgage or the transfer has been executed since the 31st December, 1881, and the money is expressed to have been advanced on a joint account, the personal representatives of the last survivor can, so far as no intention to the contrary is expressed, give a good discharge for the mortgage money, notwithstanding any notice to the payer of a severance of the joint account (*p*), and are, therefore, also in a position to exercise the statutory power of sale.

Does not apply to copyholds.

542. This devolution does not apply to land of copyhold or customary tenure vested in the tenant on the court rolls on trust or by way of mortgage (*q*).

Power of married woman to act as a *feme sole*.

543. A married woman is able, without her husband, to dispose of or to join in disposing of real or personal property held by her solely, or jointly with any other person as personal representative,

(*l*) *Re Crunden and Meux's Contract*, [1909] 1 Ch. 690; see *Cooke* v. *Crawford* (1842), 13 Sim. 91; *Mortimer* v. *Ireland* (1847), 11 Jur. 721; *Re Morton and Hallett* (1880), 15 Ch. D. 143, C. A.; *Re Rumney and Smith*, [1897] 2 Ch. 351, C. A.; *Re Pixton and Tong's Contract*, [1897] W. N. 178; *Re Waidanis*, *Rivers* v. *Waidanis*, [1908] 1 Ch. 123, holding *Ockleston* v. *Heap* (1847), 1 De G. & Sm. 640, to have been overruled by *Hall* v. *May* (1857), 3 K. & J. 585. It is doubtful whether the decision in *Osborn* to *Rowlett* (1880), 13 Ch. D. 774, to the effect that when real estate is devised to trustees and their heirs (omitting the word "assigns") in trust for sale, the trust is annexed not to the person, but to the fee simple, so as to be exercisable by the devisee of the surviving trustee ought to be followed (*Re Morton and Hallett*, *supra*, *per* BAGGALLAY, L.J., at p. 149; *Re Crunden and Meux's Contract*, *supra*, *per* PARKER, J., at p. 695).

(*m*) *Re Routledge's Trusts*, *Routledge* v. *Saul*, [1909] 1 Ch. 280. For the full treatment of this subject, see title TRUSTS AND TRUSTEES.

(*n*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 30.

(*o*) *Ibid.*, s. 21 (4). The statutory power of sale only applies to a case of a mortgage made by deed (*ibid.*, s. 19).

(*p*) *Ibid.*, s. 61; and see, generally, title MORTGAGE.

(*q*) Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 88. This section re-enacts the Copyhold Act, 1887 (50 & 51 Vict. c. 73), s. 45. For the devolution of copyholds vested in a sole trustee dying between the commencement of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), and the Copyhold Act, 1887 (50 & 51 Vict. c. 71), see *Re Mills' Trusts* (1887), 37 Ch. D. 312; affirmed (1888), 40 Ch. D. 14, C. A.

in like manner as if she were a *feme sole* (*r*), and all such dispositions made by a married woman after the 31st December, 1882, are valid, but are not to affect any title or right which has been acquired through or with the concurrence of the husband before the 1st January, 1908 (*s*).

Appointment of special executors for trust and mortgage estates.

544. Where a testator's will contains an appointment of general executors, and they alone prove, his trust and mortgage estates devolve upon such executors as his legal personal representatives, although the will may also contain an appointment of special executors of the trust or mortgage estates (*t*).

Trust and mortgage estates not affected by criminal conviction.

545. Trust and mortgage estates vested in a person who has become a convict within the meaning of the Forfeiture Act, 1870 (*a*), descend to his representatives as if he had not become a convict; but the beneficial interest of the convict in the property passes to the statutory administrator (*b*).

SUB-SECT. 14.—*Where Joint Representatives.*

Joint representation.

546. Joint representatives are regarded in the light of an individual person (*c*). Accordingly, one of several executors can give a good discharge for a debt due to the estate (*d*); can assign or surrender a term (*e*); can settle an account with a person accountable to the estate, even, it would appear, against the assent of his co-executor (*f*); and the same principle applies to joint administrators (*g*). But where several executors have been registered as the holders of stock or shares in a company incorporated under the provisions of the Companies Clauses Consolidation Act, 1845 (*h*), a transfer by some or one only is invalid (*i*); and in the case of stock registered at the Bank of England, the Bank may require all the executors who have proved the will to join in the transfer (*k*); the share or interest of a member in a company registered under the Companies Acts is personal estate transferable in manner provided by the regulations of the company, and is not of the nature of real estate (*l*).

(*r*) Married Women's Property Act, 1907 (7 Edw. 7, c. 18), s. 1 (1).

(*s*) *Ibid.*, s. 1 (2). This section was intended to remove the difficulty created by the decision in *Re Harkness and Allsopp's Contract*, [1896] 2 Ch. 358.

(*t*) *Re Parker's Trusts*, [1894] 1 Ch. 707.

(*a*) 33 & 34 Vict. c. 23; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 428 *et seq.*

(*b*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 48.

(*c*) Bac. Abr., tit. Executors and Administrators (D, 1).

(*d*) *Charlton* v. *Durham (Earl)* (1869), 4 Ch. App. 433.

(*e*) *Simpson* v. *Gutteridge* (1816), 1 Madd. 609.

(*f*) *Smith* v. *Everett* (1859), 27 Beav. 446. In *Lepard* v. *Vernon* (1813), 2 Ves. & B. 51, it was held that a court of equity would not assist such a settlement; see also *Drage* v. *Hartopp* (1885), 28 Ch. D. 414, as to one executor bringing foreclosure proceedings, the other having absconded.

(*g*) *Jacomb* v. *Harwood* (1751), 2 Ves. Sen. 265.

(*h*) 8 & 9 Vict. c. 16.

(*i*) *Barton* v. *North Staffordshire Rail. Co.* (1888), 38 Ch. D. 458; *Barton* v. *London and North Western Rail. Co.* (1889), 24 Q. B. D. 77, C. A.

(*k*) National Debt Act, 1870 (33 & 34 Vict. c. 71), s. 23.

(*l*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 22 (1). Under art. 21 of Table A to the Act, it is provided that executors or administrators of a deceased sole holder of a share shall be the only persons recognised by the

SECT. 2.
Real Estate.

SECT. 2.—*Real Estate.*

SUB-SECT. 1.—*In the Case of a Person dying before the 1st January, 1898.*

Real estate.

547. The real estate of a person who died before the 1st January, 1898, is not vested in his personal representatives. Where, however, a will directs that the executors shall sell the testator's land, the executors have what is known as a common law power of sale, which is exercisable by those who have accepted probate, without the concurrence of those who have renounced (*m*), and by the executors of the last surviving executor (*n*); but not by an administrator with the will annexed (*o*). Although under such power the executors do not take the legal estate (*p*), as soon as the power is executed the legal estate is in the vendee (*q*).

Common law power of sale.

Implied power of sale.

548. Where a testator directs his estate to be disposed of for certain purposes, without declaring by whom the sale is to be made, the executors have an implied power of sale if the proceeds are distributable by them (*r*).

Statutory power in case of charge of debts and legacies.

In the case of a will which has come into operation since the 13th August, 1859, where the testator has charged his real estate with the payment of debts or legacies, and has not devised his whole estate and interest therein to trustees, his executors or executor for the time being have power to raise the debts and legacies by a sale or mortgage of the realty (*s*); and the purchaser or mortgagee is not bound to inquire whether the power is being duly exercised (*t*). This power is not exercisable where there is a devise to any person or persons in fee simple or in tail, or for the testator's whole estate and interest, charged with debts or legacies (*a*). To exclude the power of the executor the devise must operate immediately upon the death of the testator (*b*), and must be either to a single person or to a number of persons as joint tenants or tenants in common (*c*). The power is not exercisable by an administrator with the will annexed (*d*).

When statutory power not exercisable.

company as having any title to the share. In the case of a share registered in the names of two or more holders, the survivors or survivor, or the executors or administrators of the deceased survivor, shall be the only persons recognised by the company as having any title to the share, see, generally, title COMPANIES, Vol. V., pp. 190 *et seq.*

(*m*) Stat. (1529) 21 Hen. 8, c. 4; *Peppercorn* v. *Wayman* (1852), 5 De G. & Sm. 230, 235; *Re Fisher* (1884), 13 L. R. Ir. 546; see, too, *Crawford* v. *Forshaw* [1891] 2 Ch. 261, C. A.

(*n*) *Forbes* v. *Peacock* (1840), 11 Sim. 152; Sugden on Powers, 8th ed., p. 118.

(*o*) *Re Clay and Tetley* (1880), 16 Ch. D. 3, C. A.

(*p*) *Doe* d. *Hampton* v. *Shotter* (1838), 8 Ad. & El. 905.

(*q*) *Warneford* v. *Thompson* (1797), 3 Ves. 513.

(*r*) *Tylden* v. *Hyde* (1825), 2 Sim. & St. 238; *Curtis* v. *Fulbrook* (1849), 8 Hare, 25, 278; Sugden on Powers, 8th ed., p. 115; *Carlisle* v. *Cooke*, [1905] 1 I. R. 269.

(*s*) Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 16.

(*t*) *Ibid.*, s. 17. As to sale of land generally, see title SALE OF LAND.

(*a*) *Ibid.*, s. 18; *Re Rebbeck, Bennett* v. *Rebbeck*, [1894] W. N. 68.

(*b*) *Re Barrow-in-Furness Corporation and Rawlinson's Contract*, [1903] 1 Ch. 339.

(*c*) *Ibid.*, p. 348. A devise for life with remainder in fee does not exclude the executor's power (*Re Wilson, Pennington* v. *Payne* (1886), 54 L. T. 600).

(*d*) *Re Clay and Tetley* (1880), 16 Ch. D. 3, C. A.

When charge will be implied: (i.) Under a direction to pay debts or legacies.

549. In the absence of an express charge of debts or legacies, a charge will be implied where there is a general direction by the testator that his debts or legacies shall be paid, even though the only direction to be found is contained in the general introductory words of the will (*e*). Where, however, the direction to pay debts or legacies is coupled with a direction that they are to be paid by the executor, and there is no devise of real estate to him, no charge is to be implied (*f*).

(ii.) Under a similar direction coupled with a devise of all the realty.

(iii.) Under a similar direction coupled with a devise of portion of realty.

Where in addition to a direction to his executors to pay his debts or legacies the testator devises to them the whole of his real estate, a charge will be implied whether the executors take the whole beneficial interest (*g*), though in unequal shares (*h*), or only a life interest (*i*), or no beneficial interest at all (*k*). Where the direction to the executors to pay debts or legacies is accompanied by a devise of a portion only of the testator's realty, it is a question of intention to be gathered from the whole will whether the portion so devised is charged with the payment of debts (*l*).

Authority only does not charge.

550. An authority to pay debts, as opposed to a direction, does not charge them on the real estate (*m*).

When purchaser bound to inquire as to payment of debts and legacies.

551. Where an executor is selling freeholds under a charge of debts or legacies the purchaser is not bound or entitled, in the absence of special circumstances, to inquire whether the debts or legacies have been paid, unless twenty years have elapsed from the testator's death (*n*).

Right of the representative to enter.

552. The representative may enter into the house of his testator and remove his personal effects if he can do so without violence (*o*); the power extends to the case of a deceased tenant for life or tenant in tail (*p*).

Power of distress.

Executors and administrators have a statutory power of distress for arrears of rents and fee-farms issuing out of freehold

(*e*) *Shallcross* v. *Finden* (1798), 3 Ves. 738; *Clifford* v. *Lewis* (1820), Madd. & G. 33; *Graves* v. *Graves* (1836), 8 Sim. 43; *Wrigley* v. *Sykes* (1856), 21 Beav. 337.

(*f*) In such a case it was assumed that the testator meant that the debts should be paid only out of the property which passed to his executor. The technicality of the distinction was observed upon by ROMILLY, M.R., in *Cook* v. *Dawson* (1861), 29 Beav. 123, at p. 127, but was stated to be too firmly established to be disturbed.

(*g*) *Henvell* v. *Whitaker* (1827), 3 Russ. 343.

(*h*) *Re Tanqueray-Willaume and Landau* (1882), 20 Ch. D. 465, C. A.

(*i*) *Finch* v. *Hattersley* (1775), 3 Russ. 345, n.

(*k*) *Hartland* v. *Murrell* (1859), 27 Beav. 204; *Re De Burgh Lawson, De Burgh Lawson* v. *De Burgh Lawson* (1889), 41 Ch. D. 568, where the executors took as trustees with some beneficial interest.

(*l*) *Re Bailey, Bailey* v. *Bailey* (1879), 12 Ch. D. 268, explaining *Warren* v. *Davies* (1833), 2 My. & K. 49, and *Wasse* v. *Heslirgton* (1834), 3 My. & K. 495.

(*m*) *Re Head's Trustees and MacDonald* (1890), 45 Ch. D. 310, C. A.

(*n*) *Re Tanqueray-Willaume and Landau, supra*, shortening the period laid down in *Sabin* v. *Heape* (1859), 27 Beav. 553. The twenty years rule does not apply to a sale of leaseholds (*Re Whistler* (1887), 35 Ch. D. 561; *Re Venn and Furze's Contract*, [1894] 2 Ch. 101, explaining *Re Molyneux and White* (1884), 15 L. R. Ir. 383, C. A.).

(*o*) Went. Off. Ex., 14th ed., p. 202.

(*p*) *Stodden* v. *Harvey* (1608), Cro. Jac. 204.

SECT. 2. Real Estate.

hereditaments accrued due in the lifetime of their testator (*q*). They have also a statutory power of distress for arrears of rent reserved by lease (*r*).

SUB-SECT. 2.—*In the Case of a Person dying on or since the 1st January, 1898.*

Statutory devolution upon personal representative.

553. Real estate vested in any person who has died on or since the 1st January, 1898, without a right in any other person to take by survivorship, devolves upon his death to, and becomes vested in, his personal representatives or representative from time to time, as if it were a chattel real vesting in them or him, notwithstanding any testamentary disposition (*s*).

Copyholds etc.

The real estate which thus vests in the personal representatives includes real estate over which a person executes by will a general power of appointment, but does not include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant (*t*). Equitable estates in lands of copyhold tenure and in customary freehold vest, like all other equitable estates in realty, in the personal representatives (*a*).

Personal representatives within the meaning of the statute.

554. The expression "personal representative" means, in this connection, the executor or administrator (*b*). Accordingly the real estate vests in all the executors named in the will, whether they have proved the will or not, with the exception of those who may have renounced probate or have failed to appear to a citation to take probate (*c*). Where, however, a person appoints special executors of his property abroad, and general executors of his assets in England, his real estate vests in the latter to the exclusion of the former (*d*).

Personal representatives hold in trust for persons beneficially entitled.

555. The personal representatives hold the real estate, subject to their executorial powers, rights, duties, and liabilities, as trustees for the persons by law beneficially entitled thereto, and those persons have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate (*e*).

(*q*) Stat. (1540), 32 Hen. 8, c. 37. It appears doubtful whether this statutory power applies to rents issuing out of copyholds. In *Appleton* v. *Doily* (1608), Yelv. 135, it was held that it did not; but in Gilbert on Tenures, pp. 186 *et seq.*, a careful argument is furnished to prove that it does; see also *Westmerland's (Earl) Case* (1576), 3 Leon. 59; and titles COPYHOLD, Vol. VIII., p. 70, note (*s*); DISTRESS, Vol. XI., p. 129.

(*r*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), ss. 37, 38.

(*s*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1 (1).

(*t*) *Ibid.*, s. 1 (2), (4).

(*a*) *Re Somerville and Turner's Contract*, [1903] 2 Ch. 583.

(*b*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 24 (2).

(*c*) *Re Pawley and London and Provincial Bank*, [1900] 1 Ch. 58. For the effect of renunciation and failure to appear to a citation to take probate, see p. 144, *ante*.

(*d*) *Re Cohen's Executors and London County Council*, [1902] 1 Ch. 187.

(*e*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 2 (1). Where the personal representatives are registered as the proprietors of land, no fee is chargeable on transfer by them, unless the transfer is for valuable consideration (*ibid.*, s. 3 (3); see, further, pp. 266, 268, *post*.

Power of personal representatives to convey land contracted to be sold.

556. Irrespective of their powers to convey freeholds in the case of a person who has died on or since the 1st January, 1898, the personal representatives of a person who has died since the 31st December, 1881, and at whose death there was subsisting a contract enforceable against his heir or devisee for the sale of his freehold interest in any land, have power to convey the land for all their deceased's estate and interest therein (*f*), but the conveyance is not to affect the beneficial rights of any person claiming under any testamentary disposition, or as heir or next of kin of a testator or intestate (*g*).

Devolution of proceeds of sale.

557. If at the deceased's death there existed a binding agreement for sale of realty the property is treated in equity as converted into personalty (*h*). Where there is a contract giving an option of purchase, and the option is not exercised until after the death of the person giving the option, the proceeds of sale go as personalty and not as realty (*i*), even though the option is exercisable only after the death of the grantor, and he has died intestate (*k*); the intermediate rents, however, go as realty and not as personalty (*l*). But where a person by his will devises the specific property in respect of which he has granted an option of purchase, without referring in any way to the option, the proceeds of sale go to the devisee of the property (*m*); and the same rule applies even where there may be some uncertainty as to whether the option actually preceded the will, provided it was on the eve of execution and must have been present to the mind of the testator when he made his will (*n*).

Property contracted to be purchased.

558. Where a person has contracted to purchase property and dies before paying the purchase-money, the property contracted to be purchased is primarily liable for the unpaid purchase-money, unless by his will or deed or other document he has signified a contrary intention, and the devisee or heir is not entitled to have the unpaid purchase-money discharged or satisfied out of any other estate of the testator (*o*).

(*f*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 4 (1). Where the vendor has received the purchase-money before his death he becomes a trustee of the legal estate for the purchaser (see *Re Cuming* (1869), 5 Ch. App. 72; *Re Colling, a Person of Unsound Mind* (1886), 32 Ch. D. 333, C. A.), and the estate contracted to be sold accordingly devolves upon his personal representatives under s. 30 of the Act; see p. 233, *ante*. As to sale of land generally, see title SALE OF LAND.

(*g*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 4 (2).

(*h*) *Lysaght* v. *Edwards* (1876), 2 Ch. D. 499; *Re Thomas, Thomas* v. *Howell* (1886), 34 Ch. D. 166. As to the doctrine of conversion, see title EQUITY, Vol. XIII., pp. 104 *et seq.*

(*i*) *Lawes* v. *Bennett* (1785), 1 Cox, Eq. Cas. 167.

(*k*) *Re Isaacs, Isaacs* v. *Reginall*, [1894] 3 Ch. 506.

(*l*) *Townley* v. *Bedwell* (1808), 14 Ves. 591.

(*m*) *Weeding* v. *Weeding* (1861), 1 John. & H. 424; *Emuss* v. *Smith* (1848), 2 De G. & Sm. 722.

(*n*) *Re Pyle, Pyle* v. *Pyle*, [1895] 1 Ch. 724.

(*o*) See Real Estate Charges Acts, 1854, 1867, and 1877 (17 & 18 Vict. c. 113; 30 & 31 Vict. c. 69; 40 & 41 Vict. c. 34), a series of statutes known as Locke King's Acts; and see *Re Cockcroft, Broadbent* v. *Groves* (1883), 24 Ch. D. 94; and p. 289, *post*.

Part IV.—Duties of the Representative.

SECT. 1. First Duties.

SECT. 1.—*First Duties.*

SUB-SECT. 1.—*The Funeral.*

Disposal of the body.

559. Where a person appoints executors they are *primâ facie* entitled to the possession (*p*), and are responsible for the burial, of the dead body (*q*). The ordinary method of disposing of a body is by burying it in a decent or "Christian" manner (*r*); but cremation was never illegal (*s*), and has now a statutory sanction (*t*).

The representatives of a person are not bound in point of law by directions given by their testator as to the disposal of his body (*u*), except in the case of directions given with regard to the anatomical examination of his body after death (*v*).

Funeral expenses.

560. Proper funeral expenses are payable out of the estate in priority to all other charges (*x*); the amount to be allowed depends upon the degree and station in life of the party. Where the estate subsequently proves insolvent, the representative is entitled to reasonable expenses only (*y*). The furnishing of mourning to the widow or family is not a funeral expense which can be claimed against the estate (*z*).

Mourning.

Responsibility of executor for funeral expenses.

The executor is responsible to the undertaker for the proper charges of the funeral even in the absence of a specific contract (*a*), unless the latter has given credit to a third party (*b*). Where the order for the funeral has been given by a third party and the executor has ratified it, the expenses are recoverable by the third

(*p*) There is, however, no property in a corpse (*R.* v. *Sharpe* (1857), 7 Cox, C. C. 214, C. C. R., *per* ERLE, J., at p. 216; *Williams* v. *Williams* (1882), 20 Ch. D. 659, *per* KAY, J., at p. 665.

(*q*) 2 Bl. Com. 508; *Ambrose* v. *Kerrison* (1851), 10 C. B. 776; *Williams* v. *Williams*, *supra*, at p. 664. As to the duty of a father to bury a child, or a husband a wife, see title BURIAL AND CREMATION, Vol. III., p. 405. For inquests on dead bodies, see title CORONERS, Vol. VIII., pp. 239 *et seq.*

(*r*) See title BURIAL AND CREMATION, *supra*.

(*s*) *R.* v. *Price* (1884), 12 Q. B. D. 247.

(*t*) Cremation Act, 1902 (2 Edw. 7, c. 8). The cremation of the remains of a person known to have left written directions to the contrary is prohibited (Cremation Regulations, 1903, 2, 3).

(*u*) *Williams* v. *Williams*, *supra*.

(*v*) Anatomy Acts, 1832 and 1871 (2 & 3 Will. 4, c. 75; 34 & 35 Vict. c. 16); see also title MEDICINE AND PHARMACY.

(*x*) 3 Co. Inst. 202; *Tugwell* v. *Heyman* (1812), 3 Camp. 298; *Sharp* v. *Lush* (1879), 10 Ch. D. 468, *per* JESSEL, M.R., at p. 472. The expenses are allowable out of the estate, even where the executor is, as the husband, under a legal obligation to bury the deceased (*Re M'Myn*, *Lightbown* v. *M'Myn* (1886), 33 Ch. D. 575).

(*y*) *Edwards* v. *Edwards* (1834), 2 Cr. & M. 612; see also 2 Bl. Com. 508; *Offley* v. *Offley* (1691), Prec. Ch. 26, 27; *Stag* v. *Punter* (1744), 3 Atk. 119; *Hancock* v. *Podmore* (1830), 1 B. & Ad. 260; *Bissett* v. *Antrobus* (1831), 4 Sim. 512; *Bridge* v. *Brown* (1843), 2 Y. & C. Ch. Cas. 181.

(*z*) *Johnson* v. *Baker* (1825), 2 C. & P. 207. A general discretion given to the executor may be sufficient to justify such an expense (*Pai* v. *Canterbury* (*Archbishop*) (1807), 14 Ves. 364).

(*a*) *Ambrose* v. *Kerrison* (1851), 10 C. B. 776; *Rogers* v. *Price* (1829), 3 Y. & J. 28.

(*b*) *Brice* v. *Wilson* (1834), 3 Nev. & M. (K. B.) 512.

party against the executor (*c*); but a person who has voluntarily given the order as an act of bounty cannot afterwards claim to be repaid out of the estate (*d*). In a proper case a grant of administration may be made to the undertaker as a creditor of the estate (*e*).

Tombstone.

A direction in a man's will to erect a monument in his memory is one which may be lawfully complied with by his executors (*f*), but without such a direction they are not entitled to pay out of the assets the costs of a tombstone or other memorial (*g*).

SUB-SECT. 2.—*Making an Inventory.*

Statutory obligation to make an inventory.

561. By an ancient statute (*h*) executors and administrators must make an inventory of all the goods, chattels, wares, merchandises, as well movable as not movable, that belonged to their testator or intestate; and this statutory obligation is imposed upon them as part of their duty, without any proceeding calling upon them to do so. It appears to be doubtful whether this statutory provision has ever been repealed (*i*), but the present practice, as exemplified both in the oath to lead to probate and in the administrator's bond, is for the representative to exhibit an inventory only when he is lawfully required so to do (*k*).

Modern practice.

Who entitled to apply for an inventory.

Any interest in the estate of a testator or intestate is sufficient to support an application for an inventory (*l*), and mere lapse of time is no bar to the right (*m*); but the court has a discretion to refuse the application (*a*). The duty to exhibit an inventory is not confined to the original representatives, but may be enforced against the representatives of an administrator *cum testamento annexo* (*b*), or against the executor of one of several executors, there being an executor of the original testator still surviving (*c*).

The court can only require that the property of which the deceased died possessed should be included in the inventory; it cannot call for an account of the subsequent profits of his business (*d*).

(*c*) *Green* v. *Salmon* (1838), 8 Ad. & El. 348; *Lucy* v. *Walrond* (1873), 3 Bing. (N. C.) 841.

(*d*) *Coleby* v. *Coleby* (1866), 12 Jur. (N. S.) 496.

(*e*) *Newcombe* v. *Beloe* (1867), L. R. 1 P. & D. 314; *In the Goods of Fowler* (1852), 16 Jur. 894.

(*f*) *Re Dean, Cooper-Dean* v. *Stevens* (1889), 41 Ch. D. 552, *per* NORTH, J., at p. 557. As to the nature of gifts for the erection and repair of tombstones, see title CHARITIES, Vol. IV., pp. 118, 119, 149.

(*g*) *Bridge* v. *Brown* (1843), 2 Y. & C. Ch. Cas. 181.

(*h*) Stat. (1529) 21 Hen. 8, c. 5, s. 2.

(*i*) The Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 80, repealed so much of 21 Hen. 8, c. 5, as requires any surety, bond, or other security to be taken from a person to whom administration is committed, and it is uncertain whether those words are sufficient to cover an inventory.

(*k*) The present practice was the practice so far back as the year 1811 (*Phillips* v. *Bignell* (1811), 1 Phillim. 239, *per* Sir JOHN NICHOLL, at p. 240).

(*l*) *Myddleton* v. *Rushout* (1797), 1 Phillim. 244.

(*m*) *Jickling* v. *Bircham* (1843), 2 Notes of Cases, 463; *Scurrah* v. *Scurrah* (1840), 2 Curt. 919, 921.

(*a*) *Burgess* v. *Marriott* (1843), 3 Curt. 424, 426; *Ritchie* v. *Rees* (1822), 1 Add. 144; *Bowles* v. *Harvey* (1832), 4 Hag. Ecc. 241; *Scurrah* v. *Scurrah, supra*.

(*b*) *Ritchie* v. *Rees, supra*, at p. 158.

(*c*) *Gale* v. *Luttrell* (1824), 2 Add. 234.

(*d*) *Pitt* v. *Woodham* (1828), 1 Hag. Ecc. 247, 250.

SECT. 1. **First Duties.**

SUB-SECT. 3.—*Getting-in and Investment of the Property.*

General rule as to period within which unauthorised securities should be realised.

562. The general rule is that a year is a reasonable time within which an executor should realise investments which it is not proper to retain (*e*). The rule has been described as a *primâ facie* and not a fixed rule (*f*), and where executors acting in the honest exercise of their discretion postpone the sale beyond the end of the first year, they will not be liable for any loss occasioned by the postponement (*g*).

Where directions given by the will.

A direction contained in the will that the executors should sell with all convenient speed does not render it obligatory upon them to sell at any particular time: they are still entitled to exercise a reasonable discretion (*h*). Executors should, however, where the will contains such a direction, get rid of shares in an unlimited company as soon as possible (*i*). They may be charged with a loss occasioned by their refusing an advantageous offer (*k*).

Where discretion given.

Where executors are given a discretion under their testator's will as to the retention or the postponement of the conversion of his existing securities, they are not liable for mere errors of judgment, if they act honestly and with ordinary prudence (*l*), even though the securities retained are shares in an unlimited company (*m*).

Getting in outstanding money unsecured.

563. An executor ought to get in as speedily as possible all money of his testator which is outstanding upon personal security only (*n*), and call in any balance due from a co-executor (*o*). He is, however, not required to make good the loss if he has done all he can to obtain payment, though his efforts have not proved successful; and even if he has taken no steps to obtain payment, but it appears, or there is reasonable ground for believing, that such steps would have been ineffectual, he is exonerated from liability (*p*); but the burden of proving the grounds of his belief rests upon him (*q*).

Getting in moneys secured on mortgage.

In the case of money outstanding on real security, there is no duty upon the executors to realise a mortgage created by the testator

(*e*) *Hiddingh* (*Heirs*) v. *De Villiers Denyssen, Hiddingh* (*William*) v. *Denyssen, Denyssen* v. *Hiddingh* (*William*) (1887), 12 App. Cas. 624, P. C., *per* Lord HOBHOUSE, at p. 631.

(*f*) *Grayburn* v. *Clarkson* (1868), 3 Ch. App. 605, *per* PAGE WOOD, L.J., at p. 606; see, too, *Hughes* v. *Empson* (1856), 22 Beav. 181.

(*g*) *Buxton* v. *Buxton* (1835), 1 My. & Cr. 80; *Marsden* v. *Kent* (1877), 5 Ch. D. 598, C. A.; *Re Chapman, Cocks* v. *Chapman*, [1896] 2 Ch. 763, C. A., *per* RIGBY, L.J., at p. 782.

(*h*) *Grayburn* v. *Clarkson, supra, per* SELWYN, L.J., at p. 608.

(*i*) *Grayburn* v. *Clarkson, supra; Sculthorpe* v. *Tipper* (1871), L. R. 13 Eq. 232.

(*k*) *Taylor* v. *Tabrum* (1833), 6 Sim. 281; *Fry* v. *Fry* (1859), 27 Beav. 144.

(*l*) *Re Chapman, Cocks* v. *Chapman, supra; Re Smith, Smith* v. *Thompson*, [1896] 1 Ch. 71. For the rights as between tenant for life and remainderman in respect of wasting or reversionary property see p. 284, *post*.

(*m*) *Re Norrington, Brindley* v. *Partridge* (1879), 13 Ch. D. 654, C. A.

(*n*) *Lowson* v. *Copeland* (1787), 2 Bro. C. C. 156; *Powell* v. *Evans* (1801), 5 Ves. 839; *Tebbs* v. *Carpenter* (1816), 1 Madd. 290; *A.-G.* v. *Higham* (1843), 2 Y. & C. Ch. Cas. 634; *Caney* v. *Bond* (1843), 6 Beav. 486; *Gardner* v. *Gardner* (1837), 1 Jur. 402; *Evans* v. *Flight* (1838), 2 Jur. 818.

(*o*) *Stiles* v. *Guy* (1849), 1 H. & Tw. 523.

(*p*) *Clack* v. *Holland* (1854), 19 Beav. 262, *per* ROMILLY, M.R., at p. 271; *Re Roberts, Knight* v. *Roberts* (1897), 76 L. T. 479, C. A.

(*q*) *Re Brogden, Billing* v. *Brogden* (1888), 38 Ch. D. 546, C. A.

himself, where the realisation is not required for any testamentary purpose, and the security itself is not in any peril (*r*). Where the security has fallen in value below the two-thirds limit, it is not the absolute duty of the executors at once to call in the mortgage, but they have a discretion, which they must exercise as practical men, with due regard to all the circumstances of the case (*s*).

Investment of cash.

564. Where the executor is not directed by the will to invest his testator's money he incurs no liability by leaving it with bankers (*t*), but he must keep it on a separate account and not mix it with other money (*u*). Where he is under an obligation to invest he must not allow money to remain at the bankers for an unnecessarily long period (*a*), though he may leave a considerable sum there for the purposes of administration (*b*), or pending an investment being found (*c*). If he leaves money with his bankers to be invested he should see that the investment is made (*d*).

Lending money on personal security.

565. In the absence of express authority the representatives ought not to lend on personal security (*e*), though given by several persons (*f*). Even where there is authority to lend on personal security, representatives ought not to lend to one of themselves (*g*); nor should they, without authority, lend upon second (*h*) or contributory mortgages (*i*).

SUB-SECT. 4.—*Notices for Claims.*

Issue of advertisements.

566. In order to safeguard himself the representative should issue advertisements for claims against the estate (*k*). The advertisement should be inserted in the *London Gazette* (*l*), but there is

(*r*) *Re Chapman, Cocks* v. *Chapman*, [1896] 2 Ch. 763, C. A., *per* LOPES, L.J., at p. 778.

(*s*) *Re Medland, Eland* v. *Medland* (1889), 41 Ch. D. 476, C. A.; and see Trustee Act, 1893, Amendment Act, 1894 (57 & 58 Vict. c. 10), s. 4. For the rules as to lending money on mortgage, see title TRUSTS AND TRUSTEES.

(*t*) *Johnson* v. *Newton* (1853), 11 Hare, 160; *Re Marcon's Estate, Finch* v. *Marcon*, [1871] W. N. 148.

(*u*) *Wilks* v. *Groom* (1856), 25 L. J. (CH.) 724, *per* KINDERSLEY, V.-C., at p. 729.

(*a*) *Moyle* v. *Moyle* (1831), 2 Russ. & M. 710; *Fletcher* v. *Walker* (1818), 3 Madd. 73.

(*b*) *Dawson* v. *Massey* (1809), 1 Ball & B. 219, 231; *Swinfen* v. *Swinfen* (No. 5) (1860), 29 Beav. 211.

(*c*) *Fenwick* v. *Clarke* (1862), 4 De G. F. & J. 240.

(*d*) *Challen* v. *Shippam* (1845), 4 Hare, 555.

(*e*) *Walker* v. *Symonds* (1818), 3 Swan. 1, 63.

(*f*) *Holmes* v. *Dring* (1788), 2 Cox, Eq. Cas. 1.

(*g*) —— v. *Walker* (1828), 5 Russ. 7; *Stickney* v. *Sewell* (1835), 1 My. & Cr. 8.

(*h*) *Norris* v. *Wright* (1851), 14 Beav. 291, 308; *Drosier* v. *Brereton* (1851), 15 Beav. 221, 226; *Lockhart* v. *Reilly* (1857), 1 De G. & J. 464, 476; *Re Roberson, Campkin* v. *Barton*, [1883] W. N. 110.

(*i*) *Webb* v. *Jonas* (1888), 39 Ch. D. 660. For trust investments generally, see Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 1; *Re Whiteley, Whiteley* v. *Learoyd* (1886), 33 Ch. D. 347, C. A.; and title TRUSTS AND TRUSTEES.

(*k*) See Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 29; *Re Kay, Mosley* v. *Kay*, [1897] 2 Ch. 518. For advertisements in administration proceedings, see R. S. C., Ord. 55, rr. 44—61.

(*l*) *Wood* v *Weightman* (1872), L. R. 13 Eq. 434.

SECT. 1. First Duties.

no absolute rule requiring it to be inserted in any other London newspaper—that must depend upon the circumstances of each case (*m*). Where the residence of the deceased was outside London an advertisement should be inserted in a newspaper in the neighbourhood (*n*). In the absence of special circumstances there is no reason why the advertisement should be inserted more than once (*o*).

Effect of advertising.

At the expiration of the time specified in the advertisement for sending in claims (*p*) the representative is at liberty to distribute the assets, having regard to those claims of which he has notice, but he is under no liability in respect of those assets to any person of whose claim he has had no notice (*q*). He is entitled to the same protection as if he had administered the estate under a judgment of the court (*r*), and although the assets so distributed may be followed into the hands of the persons who have received them (*s*), the representative is not *quâ* representative a proper party to the action (*t*). He is not, however, free from liabilities of which he has notice, though no claim in respect thereof has been sent in in answer to his advertisement (*a*).

SECT. 2.—*The Payment of Debts presently due.*

SUB-SECT. 1.—*Legal and Equitable Assets.*

When distinction between legal and equitable assets is of importance.

567. Although for most purposes the distinction between legal and equitable assets is now obsolete (*b*), it is still of practical importance in connection with the executor's right of retainer (*c*), and in cases where the representative takes upon himself to administer an insolvent estate without the direction of the court.

Administration of estate out of court.

568. Where an insolvent estate is being administered by the court, the rules of bankruptcy are incorporated, the general principle of those rules being that all creditors are to be paid *pari passu* whatever the nature of the assets (*d*): but those rules do not govern the distribution of an insolvent estate by the representative out of court. In the latter case the old common law rules must be observed and the testator's legal assets applied in payment of the creditors of the estate according to the degree of their respective debts. Should the representative with notice of a debt of higher

(*m*) *Re Bracken, Doughty* v. *Townson* (1889), 43 Ch. D. 1, C. A., *per* COTTON, L.J., at p. 9.

(*n*) *Wood* v. *Weightman* (1872), L. R. 13 Eq. 434.

(*o*) *Re Bracken, Doughty* v. *Townson, supra, per* NORTH, J., at p. 7; see, too, R. S. C., Ord. 55, r. 45.

(*p*) The representative should not give less than a month's notice (see *Stuart* v. *Babington* (1891), 27 L. R. Ir. 551).

(*q*) Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 29.

(*r*) *Clegg* v. *Rowland* (1866), L. R. 3 Eq. 368.

(*s*) Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 29.

(*t*) *Clegg* v. *Rowland, supra; Hunter* v. *Young* (1879), 4 Ex. D. 256, C. A.; *Re Frewen, Frewen* v. *Frewen* (1889), 60 L. T. 953.

(*a*) *Re Land Credit Co. of Ireland, Markwell's Case* (1872), 21 W. R. 135.

(*b*) *Re Orlebar, Wynter* v. *Orlebar*, [1908] 1 Ch. 136, *per* NEVILLE, J., at p. 140; and see title EQUITY, Vol. XIII., pp. 33, 34, 35.

(*c*) The executor's right of retainer is limited to legal assets; see p. 256, *post*.

(*d*) For administration by the court of insolvent estates, see p. 344, *post*.

degree (*e*) apply the legal assets in payment of a debt of lower degree, he renders himself personally liable for a *devastavit* in an action by any creditor of higher degree if he allows that action to proceed to judgment. He can, however, guard himself against personal liability by obtaining an administration order in the Chancery Division, before judgment is pronounced in the creditor's action, and having that action transferred to the judge in whose court the administration order has been made (*f*).

Nature of the distinction.

569. The distinction between legal and equitable assets does not depend upon the nature of the property, but upon the remedy of the creditor. The question is not whether the assets could have been recovered by the representative in a court of law or in a court of equity, but whether they could have been made available for the payment of the creditor's debt in an action at law or only through a court of equity (*g*).

Personalty is legal assets.

Accordingly all the personal estate and effects, including chattel real interests, are legal assets in the hands of the representative (*h*), even though the testator had merely an equitable estate therein (*i*); personalty over which the testator has exercised a general power of appointment is also legal assets (*k*).

Realty charged with or devised subject to payment of debts is equitable assets.

In the case of any real estate which may not be vested in the executor by virtue of his office, the proceeds thereof are equitable assets, whether the executor has a mere power to sell for payment of debts (*l*), or whether the land is charged with their payment (*m*) or devised to the executor in trust to pay them (*n*).

Realty not so charged or devised is also equitable assets.

Real estate which has not been charged with or devised subject to the payment of debts is (apart from the provisions of the Land Transfer Act, 1897 (*o*)) equitable assets for the payment of all the creditors, whether by specialty or simple contract (*p*); but the creditors have no charge upon such real estate until they have

(*e*) A representative who pays creditors without notice of the existence of a creditor of higher degree is not liable to account for the sums so paid at the instance of that creditor (*Harman* v. *Harman* (1686), 2 Show. 492; *Re Fludyer, Wingfield* v. *Erskine*, [1898] 2 Ch. 562, 565).

(*f*) For transfer of proceedings after administration order, see R. S. C., Ord. 49, r. 5, and p. 342, *post*.

(*g*) *Cook* v. *Gregson* (1856), 3 Drew. 547; *Shea* v. *French*, *French* v. *French* (1857), 3 Drew. 716; *A.-G.* v. *Brunning* (1860), 8 H. L. Cas. 243, *per* Lord CRANWORTH, at p. 258.

(*h*) Shep. Touch. (ed. Preston), p. 496; Toller, Law of Executors, 7th ed., p. 136; *Mutlow* v. *Mutlow* (1859), 4 De G. & J. 539, C. A.

(*i*) *Cook* v. *Gregson, supra; Mutlow* v. *Mutlow, supra*.

(*k*) *Re Hadley, Johnson* v. *Hadley*, [1909] 1 Ch. 20, C. A., per COZENS-HARDY, M.R., at p. 32; commenting upon the dictum of LINDLEY, L.J., in *Stamp Duties Commissioner* v. *Stephen*, [1904] A. C. 137, P. C., at p. 140, to the effect that the appointed fund is equitable assets. In *Pardo* v. *Bingham* (1868), L. R. 6 Eq. 485, the appointed fund was also described as equitable assets.

(*l*) *Silk* v. *Prime* (1768), 1 Bro. C. C. 138, n.; *Bain* v. *Sadler* (1871), L. R. 12 Eq. 570.

(*m*) *Bailey* v. *Ekins* (1802), 7 Ves. 319; *Shiphard* v. *Lutwidge* (1802), 8 Ves. 26.

(*n* *Newton* v. *Bennet* (1782), 1 Bro. C. C. 134.

(*o* 60 & 61 Vict. c. 65.

(*p*) Administration of Estates Act, 1833 (3 & 4 Will. 4, c. 104), commonly known as Lord Romilly's Act. Real estate appointed under a general power falls within the Act (*Fleming* v. *Buchanan* (1853), 3 De G. M. & G. 976, C. A.).

SECT. 2. The Payment of Debts presently due.

obtained either a common law judgment or an order for administration (*q*). The rents and profits of the realty subsequent to the death are assets by accretion (*r*).

Effect of the Land Transfer Act, 1897, upon the nature of real assets.

570. The question whether real estate which vests in the representative by statute (*s*) is legal or equitable assets is one of some difficulty. It is made to vest in the representative, notwithstanding any testamentary disposition, as if it were a chattel real vesting in him (*t*), and would accordingly satisfy both the test laid down by Lord Cranworth, that it is assets which the representative is entitled to recover independently of any directions of the testator (*a*), and that laid down by Kindersley, V.-C., that it is property which he has a right to recover *virtute officii* (*b*). It is also to be administered subject to the same liabilities for debts, costs, and expenses, and with the same incidents, as if it were a personal estate (*c*). The same statutory measure provides that nothing therein contained is to alter or to affect the order in which real and personal assets respectively are applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies, and, having regard to the mode in which this proviso has been judicially construed (*d*), there may be some doubt whether the real estate in question should not be treated as equitable assets.

Creditor's right to have real estate administered.

571. A creditor, whether by specialty or simple contract, has the right to have his debtor's real estate, of whatever tenure, administered in a court of equity (*e*).

Statutory rights of creditor against heir or devisee.

In addition to the above right, the creditor has certain statutory rights against the heir or devisee of his debtor's real estate. By virtue of the Debts Recovery Act, 1830 (*f*), a creditor by specialty has the right to sue the heir or devisee of his debtor, the heir or devisee being liable for his testator's specialty debts to the value of the lands descended or devised. Upon alienation the heir or devisee becomes personally liable to the value of the lands aliened, but the land cannot be followed into the hands of a *bonâ fide* purchaser, even though he had notice of the existence of the debt (*g*). The Administration of Estates Act, 1833 (*h*), has not deprived the specialty creditor of his statutory right to sue the heir or devisee.

What is included in term "devisee."

For the purpose of the above Acts a devisee includes as well an equitable devisee as a legal devisee, and where the estate has been

(*q*) *British Mutual Investment Co.* v. *Smart* (1875), 10 Ch. App. 567 ; *Re Moon, Holmes* v. *Holmes*, [1907] 2 Ch. 304.
(*r*) *Re Hyatt, Bowles* v. *Hyatt* (1888), 38 Ch. D. 609.
(*s*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65).
(*t*) *Ibid.*, s. 1 (1).
(*a*) *A.-G.* v. *Brunning* (1860), 8 H. L. Cas. 243, *per* Lord CRANWORTH, at p. 258.
(*b*) *Cook* v. *Gregson* (1856), 3 Drew. 547, *per* KINDERSLEY, V.-C., at p. 549.
(*c*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 2 (3).
(*d*) See *Re Williams, Holder* v. *Williams*, [1904] 1 Ch. 52, *per* JOYCE, J., at p. 56.
(*e*) Administration of Estates Act, 1833 (3 & 4 Will. 4, c. 104).
(*f*) 11 Geo. 4 & 1 Will. 4, c. 47.
(*g*) *Jones* v. *Noyes* (1858), 4 Jur. (N. S.) 1033.
(*h*) 3 & 4 Will. 4, c. 104; see *Re Illidge, Davidson* v. *Illidge* (1884), 27 Ch. D. 478, C. A., *per* COTTON, L.J., at p. 482; *Worthington & Co., Ltd.* v. *Abbott*, [1910] 1 Ch. 588.

settled by the testator the term includes both the tenant for life and the remainderman (*i*).

Effect of registration of administration action as a *lis pendens*.

572. The registration by the creditor as a *lis pendens* of an action for administration sufficiently indicating the real estate sought to be charged is sufficient, before final judgment, to entitle the creditor to priority over a purchaser or mortgagee from any defendant entitled to real estate under the will, except where the defendant is in such a position that the purchaser or mortgagee has a right to suppose that he is selling or mortgaging for the purpose of paying the testator's debts (*k*).

Effect of registration of judgment.

A judgment entered up against the heir or devisee for his personal debts has not the effect of defeating the rights of the ancestor's creditors against the lands descended or devised (*l*).

SUB-SECT. 2.—*Priority of Creditors in respect of Legal Assets.*

Degrees of priority.

573. In the application of legal assets the following are the degrees of priority created by the common law: (i.) Crown debts on record or specialty; (ii.) debts of record; (iii.) debts due upon recognisance; (iv.) specialty and simple contract debts; (v.) voluntary bonds, unless assigned for value in the testator's lifetime, when they stand on the same footing as other specialty debts (*m*).

Debts due to the Crown.

(i.) Debts due to the Crown by matter of record have priority over all other debts, whether prior or subsequent in date (*n*). Debts secured to the Crown by specialty are of the same degree as those of record (*o*); a surety to the Crown who has paid the debt of his deceased principal is entitled to the Crown's priority (*p*).

The right of the Crown to be paid in priority to other creditors is a prerogative right, and whenever the right of the Crown and the right of a subject to the payment of a debt of equal degree come into competition, the Crown's right prevails (*q*). It is accordingly conceived that in the case of simple contract debts due to the Crown (*r*), such debts will have priority over both specialty and simple contract debts due to a subject on the same principle as that

(*i*) *Re Atkinson, Proctor* v. *Atkinson*, [1908] 2 Ch. 307, C. A., adopting *dictum* of Lord CHELMSFORD, L.C., in *Coope* v. *Cresswell* (1866), 2 Ch. App. 112, at p. 122, and applying *British Mutual Investment Co.* v. *Smart* (1875), 10 Ch. App. 567, and *Re Hedgely, Small* v. *Hedgely* (1886), 34 Ch. D. 379.

(*k*) *Price* v. *Price* (1887), 35 Ch. D. 297. As to judgments generally, see title JUDGMENTS AND ORDERS.

(*l*) *Kinderley* v. *Jervis* (1856), 22 Beav. 1. As to judgments generally, see title JUDGMENTS AND ORDERS.

(*m*) *Lechmere* v. *Carlisle (Earl)* (1733), 3 P. Wms. 211, 222; *Payne* v. *Mortimer* (1859), 4 De G. & J. 447, C. A. As to debts with statutory priorities, see p. 249, *post*.

(*n*) Went. Off. Ex., 14th ed., p. 261. As to death duties as Crown debts, see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 252.

(*o*) Stat. (1541-2) 33 Hen. 8, c. 39.

(*p*) *Re Churchill (Lord), Manisty* v. *Churchill* (1888), 39 Ch. D. 174.

(*q*) *Re Henley & Co.* (1878), 9 Ch. D. 469, C. A., *per* JAMES, L.J., at p. 481; *New South Wales Taxation Commissioners* v. *Palmer*, [1907] A. C. 179, 184, P. C.; *A.-G. for New South Wales* v. *Intestate Estates (Curator)*, [1907] A. C. 519, P. C.

(*r*) As to what are simple contract debts due to the Crown, see Godolphin, Orphan's Legacy, Part II., c. 28; Bac. Abr., tit. Executors and Administrators (L) 2. They include moneys due on sales of wood, tin, or other minerals, fines for copyhold estates, and moneys arising from sales of estrays within the King's manors.

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on which a simple contract creditor who has obtained a judgment against the executor is entitled to priority over both specialty and simple contract creditors (*s*).

Debts of record.

574. (ii.) Next in degree, apart from debts with statutory priorities, come debts of record. These are debts due by virtue of any judgment against the testator or intestate in any judicial proceedings in any court of record (*t*). A judgment recovered in a foreign country is considered in England a simple contract debt (*a*).

Necessity for registration of judgments against the deceased.

In the case of judgments recovered before the 1st July, 1901, registration is necessary in order to secure preference against the executors or administrators in the administration of the estate (*b*), and unless his judgment is registered the creditor ranks only with simple contract creditors (*c*). In the case of judgments recovered since that date, it appears doubtful whether registration is necessary in order to secure a preference (*d*).

Judgments against the deceased rank *pari passu*.

Judgments against a deceased person rank equally *inter se* whatever the priority of their dates (*e*), subject to the right of the representative to prefer one to another (*f*).

Judgments against the representative.

575. A judgment against the representative gives the judgment creditor priority over both specialty and simple contract creditors, even though the judgment was in respect of a simple contract debt (*g*): the judgment does not require to be registered (*h*).

(*s*) See *Re Williams' Estate, Williams* v. *Williams* (1872), L. R. 15 Eq. 270. The practice of forming two funds adopted in *Re Bentinck, Bentinck* v. *Bentinck*, [1897] 1 Ch. 673, has been disapproved of by the Court of Appeal in *Re Samson, Robbins* v. *Alexander*, [1906] 2 Ch. 584, C. A.; see p. 248, *post*.

(*t*) Godolphin, Orphan's Legacy, Part II., c. 28; *Searle* v. *Lane* (1688), 2 Vern. 88.

(*a*) *Dupleix* v. *De Roven* (1705), 2 Vern. 540; and see title CONFLICT OF LAWS, Vol. VI., p. 281.

(*b*) Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), s. 3.

(*c*) *Van Gheluve* v. *Nerinckx* (1882), 21 Ch. D. 189.

(*d*) According to the old law, as laid down in the case of *Littleton* v. *Hibbins* (1600), Cro. Eliz. 793, the representative was bound to take notice of a judgment debt upon the legal fiction that everything that was of record was known, or was supposed to be known, to everybody (*Fuller* v. *Redman* (No. 1) (1859), 26 Beav. 600, *per* ROMILLY, M.R., at p. 603). To remedy that defect, stat. (1692) 4 Will. & Mar., c. 20, was passed, providing that no judgment which was not docketed should have any preference against heirs, executors, or administrators in the administration of assets. By the Judgments Act, 1839 (2 & 3 Vict. c. 11), s. 1, the docket was closed, and thereupon the old law was revived (*Fuller* v. *Redman* (No. 1), *supra*). This defect was in its turn remedied by the Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), s. 3, which in effect required registration of judgments, but this section was itself repealed as from the 1st July, 1901, by the Land Charges Act, 1900 (63 & 64 Vict. c. 26), s. 5, Schedule. Accordingly it would appear that the old law has been revived, unless indeed the effect of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38 (2) (a), (which provides that where any act subsequently passed repeals any other enactment, then, unless the contrary intention appears, the repeal shall not revive anything not in force or existing at the time at which the repeal takes effect), is to prevent such revivor; see also titles EQUITY, Vol. XIII., p. 35; JUDGMENTS AND ORDERS; STATUTES.

(*e*) Godolphin, Orphan's Legacy, Part II., c. 28; *Dollond* v. *Johnson* (1854), 2 Sm. & G. 301, 304.

(*f*) See right to prefer, p. 254, *post*.

(*g*) *Re Williams' Estate, Williams* v. *Williams* (1872), L. R. 15 Eq. 270.

(*h*) *Jennings* v. *Rigby* (1863), 33 Beav. 198; *Re Williams' Estate, Williams* v. *Williams, supra*.

Where judgments are recovered by several creditors they rank in order of priority according to date (*i*). The judgment to give priority must have been recovered before a decree for administration was made (*k*).

A judgment or order of a court of equity stands upon the same footing as a judgment at law (*l*), though not if it merely directs an account to be taken (*m*). An order giving liberty to sign judgment does not confer priority (*n*), nor does a balance order obtained by the liquidator of a limited company (*o*).

What amounts to a judgment conferring priority.

A surety who has satisfied a judgment against a deceased principal is entitled to stand in the place of the judgment creditor, although he has not obtained an actual assignment of the judgment (*p*).

Right of surety.

576. (iii.) Next in degree to judgment debts come debts due upon recognisance (*q*). A recognisance is an obligation of record which a man enters into before some court of record or magistrate duly authorised, with condition to do some particular act, as to appear at the assizes, to keep the peace, to pay a debt or the like (*r*). In the case of a receiver appointed by the court, all moneys not accounted for, and due from him, are by his recognisance made a debt of record, although the balance due has not been ascertained (*s*).

Debts due upon recognisance.

577. (iv.) Specialty and simple contract creditors stand in equal degree, and there is no necessity for dividing the assets into two funds, for specialty and simple contract creditors respectively (*a*).

Specialty and simple contract debts.

SUB-SECT. 3.—*Debts with Statutory Priorities.*

578. In addition to the priorities created by the common law there are certain statutory preferences which extend to all the

Statutory preferences.

(*i*) *Dollond* v. *Johnson* (1854), 2 Sm. & G. 301.

(*k*) *Paxton* v. *Douglas* (1803), 8 Ves. 520; *Largan* v. *Bowen* (1803), 1 Sch. & Lef. 296. If the judgment and the administration decree were made on the same day the latter prevailed (*Parker* v. *Ringham* (1864), 33 Beav. 535); and see also p. 341, *post*.

(*l*) Bac. Abr., tit. Executors and Administrators (L), 2; *Harding* v. *Edge* (1682), 1 Vern. 143; *Searle* v. *Lane* (1668), 2 Vern. 88; *Morrice* v. *Bank of England* (1736), 3 Swan. 573.

(*m*) *Smith* v. *Haskins* (1742), 2 Atk. 385.

(*n*) *Re Stubbs' Estate, Hanson* v. *Stubbs* (1878), 8 Ch. D. 154; *Re Gurney, Clifford* v. *Gurney*, [1896] 2 Ch. 863.

(*o*) *Re Hubback, International Marine Hydropathic Co.* v. *Hawes* (1885), 29 Ch. D. 934, C. A.

(*p*) Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 5; *Re M'Myn, Lightbown* v. *M'Myn* (1886), 33 Ch. D. 575. As to principal and surety, see title GUARANTEE.

(*q*) 2 Bl. Com. 511.

(*r*) *I bid.*, p. 341.

(*s*) *Seagram* v. *Tuck* (1881), 18 Ch. D 296.

(*a*) Administration of Estates Act, 1869 (32 & 33 Vict. c. 46) (Hinde Palmer's Act); *Re Samson, Robbins* v. *Alexander*, [1906] 2 Ch. 584, C. A., overruling *Re Hankey, Cunliffe Smith* v. *Hankey*, [1899] 1 Ch. 541, and, *per* FLETCHER MOULTON, L.J., at p. 592, deciding that all prior authorities which suggest that two funds are to be formed are erroneous. As to the position of volunteers in administration of assets, see p. 275, *post;* and as to voluntary bonds, gifts, and covenants generally, see title BONDS, Vol. III., p. 89, and titles FRAUDULENT AND VOIDABLE CONVEYANCES; GIFTS.

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assets, whether legal or equitable, and have priority over all debts except, it would seem, debts due to the Crown (*b*).

Overseers of the poor.

The representatives of an overseer of the poor must within forty days after his decease deliver over all things concerning his office to some churchwarden or other overseer of the same place, and must pay out of the assets left by such overseer all sums remaining due, which he received by virtue of his office, before any of his other debts are paid and satisfied (*c*).

Friendly society officers.

The representatives of an officer of a registered friendly society or branch, having in his possession by virtue of his office (*d*) any money or property belonging to the society or branch, must, on his death, upon demand, pay the money and deliver over the property to the trustees of the society or branch in preference to any other debt or claim against the estate (*e*). It is immaterial that the money of the society cannot be specifically traced (*f*).

Savings bank officers.

The representatives of a person appointed to any office in a savings bank, and being intrusted with the keeping of accounts, or having in his hands or possession, by virtue of his office or employment, any money or effects belonging to the savings bank, or any deeds or securities relating to the same, must, upon his death, within forty days after demand, pay over all money and other things belonging to the savings bank, and must also pay out of the assets all sums of money remaining due, received by him by virtue of his office or employment, before any other of his debts are paid or satisfied. The assets are also charged with the payment of such sums (*g*). The priority of these claims is not affected by the fact that the estate may be in course of administration under the bankruptcy laws (*h*).

Persons subject to military law.

579. In the case of a person dying while subject to military law, certain claims in respect of the expenses of his last illness and funeral,

(*b*) In none of the statutes referred to, *infra*, creating preferential debts is the Crown expressly mentioned, and although the Crown may be bound by an Act which shows a clear indication to that effect, it is not bound by implication where the result would be to take away its prerogative right to priority of payment (see *A.-G. for New South Wales* v. *Intestate Estates* (*Curator*), [1907] A. C. 519, P.C., *per curiam*, at p. 523).

(*c*) Poor Relief Act, 1743 (17 Geo. 2, c. 38), s. 3. The preferential charge is confined to poor rates (*Re Booth, Fisher* v. *Shirley*, [1879] W. N. 108). As to overseers generally, see title POOR LAW.

(*d*) To insure preference the receipt must have been strictly by virtue of his office (*Re Jardine, Ex parte Fleet* (1850), 4 De G. & Sm. 52; *Re Aberdein, Hagon* v. *Aberdein*, [1896] W. N. 154).

(*e*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 35; see also title FRIENDLY SOCIETIES. A similar provision applies to the case of officers of an incorporated building society (see stat. (1834) 4 & 5 Will. 4, c. 40, s. 12; see also title BUILDING SOCIETIES, Vol. III., p. 346).

(*f*) *Moors* v *Marriott* (1878), 7 Ch. D. 543; *Re Atkins, Ex parte Edmonds* 1882), 46 L. T. 240; *Re Miller, Ex parte Official Receiver*, [1893] 1 Q. B. 327; *Re Eilbeck, Ex parte "Good Intent" Lodge, No.* 987, *of the Grand United Order of Oddfellows* (*Trustees*), [1910] 1 K. B. 136.

(*g*) Trustee Savings Banks Act, 1863 (26 & 27 Vict. c. 87), s. 14.

(*h*) Savings Banks Act, 1891 (54 & 55 Vict. c. 21), s. 13, altering the law as laid down in *Re Williams, Jones* v. *Williams* (1887), 36 Ch. D. 573.

military debts, servants' wages, and household expenses are given a preferential charge (*i*).

Preferential payments in the administration of insolvent estates under the bankruptcy laws are dealt with elsewhere (*k*).

Guardians of the poor have no preferential claim in respect of the maintenance of a deceased pauper (*l*).

SUB-SECT. 4.—*Statute-barred Debts.*

The right to pay.

580. The representative has a right to pay a debt barred by any Statute of Limitation (*m*), but he may not pay such a debt after it has been judicially declared by a court of competent jurisdiction to be so barred (*n*).

Right to set up statute after an order for administration.

581. After an order has been made for the administration of the estate, any creditor or legatee has the right to set up the statute, notwithstanding the refusal of the representative to do so, against a creditor who comes in under the order to prove his debt (*o*), but not against the plaintiff in a creditor's administration action (*p*).

Where court will not set up statute.

582. Where none of the parties are desirous of setting up the statute, the court will not set it up on behalf of an absent beneficiary (*q*). Where an originating summons has been issued by the executors (*r*) for the determination, without administration of the estate, of the question whether a defendant is a creditor, the parties must be treated as standing in the same position as if an administration order had been made, and the residuary legatee is accordingly entitled to insist upon the statute being set up (*s*).

Representative cannot pay debt barred by Statute of Frauds.

The right to pay a debt barred by a Statute of Limitation is an exception to the general rule that it is a *devastavit* for a representative to pay that which need not be paid, and is not to be extended to a debt to which the Statute of Frauds affords a good defence (*t*).

(*i*) Regimental Debts Act, 1893 (56 & 57 Vict. c. 5), s. 2; see also title ROYAL FORCES.

(*k*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 97 *et seq.*

(*l*) *Laver* v. *Botham & Sons*, [1895] 1 Q. B. 59. For the right of guardians to be reimbursed the expense of maintenance, see the Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), s. 16, and title POOR LAW.

(*m*) *Stahlschmidt* v. *Lett* (1853), 1 Sm. & G. 415; *Hill* v. *Walker* (1858), 4 K. & J. 166, disapproving of a *dictum* of BAYLEY, J., in *M'Culloch* v. *Dawes* (1826), 9 Dow. & Ry. (K. B.) 40, 43. The statute applicable to simple contract debts is the Limitation Act, 1623 (21 Jac. 1, c. 16), and to specialty debts, the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42). For the law upon the statutes generally, see title LIMITATION OF ACTIONS.

(*n*) *Midgley* v. *Midgley*, [1893] 3 Ch. 282, C. A.

(*o*) *Shewen* v. *Vanderhorst* (1831), 1 Russ. & M. 347; *Moodie* v. *Bannister* (1859), 4 Drew. 432.

(*p*) *Briggs* v. *Wilson* (1854), 5 De G. M. & G. 12, C. A.; *Fuller* v. *Redman* (No. 2) (1859), 26 Beav. 614.

(*q*) *Alston* v. *Trollope* (1866), L. R. 2 Eq. 205.

(*r*) See R. S. C., Ord. 55, rr. 3, 4.

(*s*) *Re Wenham, Hunt* v. *Wenham*, [1892] 3 Ch. 59.

(*t*) *Re Rownson, Field* v. *White* (1885), 29 Ch. D. 358, C. A. In this case *Re Garratt's Trust* (1870), 18 W. R. 684, a decision to the contrary effect, was not cited; and see p. 258, *post*.

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583. The inclusion of a debt by the representative, whether in an inventory exhibited in the Probate Division (*a*), or in an account filed in administration proceedings in the Chancery Division (*b*), or in the affidavit for Inland Revenue (*c*), is a sufficient acknowledgment to take the debt out of the operation of the Statutes of Limitation (*d*).

Inclusion in account.

Where a partner is executor of his late partner and makes payments of principal or interest on account of a partnership debt, such payments will, in the absence of proof to the contrary, be taken to have no reference to his executorial character, and will not keep the debt alive against his testator's estate (*e*).

Payments by an executor-partner.

The right of one of several representatives to pay a statute-barred debt against the wishes of his co-representatives has never been judicially determined (*f*).

Right to pay against wishes of co-representatives.

If an action be brought by the creditor against two representatives, and one admits the debt, while the other pleads the statute, the court accepts the plea of the latter as being most for the benefit of the estate (*g*).

Right of co-representative to plead the statute.

The power of one of several representatives to keep a debt alive against the personal estate of the deceased by acknowledgment or promise was, prior to the passing of Lord Tenterden's Act (*h*), the subject of conflicting decisions (*i*). It has since been decided on the language of that Act that one of several personal representatives can by acknowledgment or promise in writing (*k*) keep a simple contract debt alive against the personal estate (*l*), but as

Keeping a debt alive against personalty by acknowledgment.

(*a*) *Smith* v. *Poole* (1841), 12 Sim. 17.

(*b*) *Spollan* v. *Magan* (1851), 1 I. C. L. R. 691, 700; *Read* v. *Price*, [1909] 1 K. B. 577.

(*c*) *Re Emmett, Jenkins* v. *Emmett*, [1906] W. N. 201; *Read* v. *Price*, *supra*.

(*d*) See generally, for acknowledgments of debts in this connection, title LIMITATION OF ACTIONS.

(*e*) *Thompson* v. *Waithman* (1856), 3 Drew. 628; *Brown* v. *Gordon* (1852), 16 Beav. 302; *Re Tucker, Tucker* v. *Tucker*, [1894] 1 Ch. 724.

(*f*) *Midgley* v. *Midgley*, [1893] 3 Ch. 282, 297, C. A., where LINDLEY, L.J., expressed his opinion that it was the law that a representative might pay such a debt with knowledge that his co-representative objected to the payment: the point was, however, left open by LOPES, L.J. (*ibid.*, p. 301); see, too, *Astbury* v. *Astbury*, [1898] 2 Ch. 111, *per* STIRLING, J., at p. 115.

(*g*) *Chaffe* v. *Kelland* (1637), 1 Roll. Abr. 929; *Midgley* v. *Midgley*, *supra*, *per* LOPES, L.J., at p. 302,

(*h*) Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14).

(*i*) The authorities in favour of the view that one of several representatives could keep the debt alive against the personal estate are *Atkins* v. *Tredgold* (1823), 2 B. & C. 23; *M'Culloch* v. *Dawes* (1826), 9 Dow. & Ry. (K. B.) 40; the authorities against that view are *Tullock* v. *Dunn* (1826), Ry. & M. 416; *Scholey* v. *Walton* (1844), 12 M. & W. 510. The result of those authorities is accepted by STIRLING, J., in *Re Macdonald, Dick* v. *Fraser*, [1897] 2 Ch. 181, as showing the law to be that an acknowledgment or promise by one of several representatives had not the effect of preventing the operation of the Statutes of Limitation; but he did not consider the law to be conclusively established by those authorities.

(*k*) The acknowledgment or promise may be made in a writing signed by an agent duly authorised (Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 13).

(*l*) *Re Macdonald, Dick* v. *Fraser*, *supra*.

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the Act does not extend to specialty debts, the question is still undecided as to such debts (*m*).

Part payment of principal or interest differs in effect from an acknowledgment or promise, as such payment enures to the benefit of all persons liable to the debt, whilst the effect of an acknowledgment is confined to the person who makes it (*n*). It is accordingly conceived that one of several representatives can by such payment keep either a simple contract or a specialty debt alive against the personal estate of the deceased debtor (*o*).

By part payment.

The representative does not either by his acknowledgment or promise to pay (*p*) or by part payment of principal or interest (*q*) render his co-representative personally chargeable with the debt: and the latter will not be liable for a *devastavit* if, without knowledge of the debt having been kept alive, he pays away the assets (*r*).

Co-representative not personally liable.

584. The representative has no power to keep a debt alive against real estate which is not vested in him as personal representative (*s*), even where he is devisee in trust of the real estate, provided it is not devised to him in trust for payment of debts (*a*). Against real estate which is vested in him as personal representative, it is conceived that the representative can keep the debt alive so long as the real estate remains vested in him: once he has divested himself of the real estate by conveyance to the heir or devisee, or by assent (*b*), he can no longer keep the debt alive against the realty.

As against real estate.

585. Time runs against a creditor whose cause of action accrued during the life of the deceased debtor, although administration has not been taken out to the estate, and there has been no personal representative who can be sued (*c*). But as there can be no complete cause of action until there is somebody who can be sued (*d*), time does not begin to run against a debt payable after the debtor's

When time runs against a creditor.

(*m*) For the power of the party liable to keep a specialty debt alive by acknowledgment in writing, see Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 5; see also title LIMITATION OF ACTIONS.

(*n*) *Coope* v. *Cresswell* (1866), 2 Ch. App. 112, *per* Lord CHELMSFORD, L.C., at p. 124.

(*o*) In *Re Hollingshead, Hollingshead* v. *Webster* (1888), 37 Ch. D. 651, at p. 658, CHITTY, J., expressed his dissent from the argument that the payment of interest by one executor affected him only, and did not in any way affect his co-executor.

(*p*) Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), s. 1.

(*q*) Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 14.

(*r*) *Re Macdonald, Dick* v. *Fraser*, [1897] 2 Ch. 181, *per* STIRLING, J., at p. 188; *Re Hollingshead, Hollingshead* v. *Webster, supra, per* CHITTY, J., at p. 658.

(*s*) *Putnam* v. *Bates* (1826), 3 Russ. 188; *Astbury* v. *Astbury*, [1898] 2 Ch. 111; *Re Lacey, Howard* v. *Lightfoot*, [1907] 1 Ch. 330, C. A., *per* FARWELL, L.J., at p. 344, and *per* BUCKLEY, L.J., at p. 351.

(*a*) *Fordham* v. *Wallis* (1853), 10 Hare, 217; *Coope* v. *Cresswell* (1866), 2 Ch. App. 112.

(*b*) See Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 3. For the power of a devisee for life, as against the remainderman, and for that of a devisee of one portion of the real estate as against the devisee of another portion to keep a debt alive, see title LIMITATION OF ACTIONS.

(*c*) *Boatwright* v. *Boatwright* (1873), L. R. 17 Eq. 71.

(*d*) *Douglas* v. *Forrest* (1828), 8 Bing. 686, *per* BEST, C.J., at p. 704.

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death until administration has been taken out to his estate (*e*), or until the executor, in case of testacy, has, before obtaining probate, so meddled with the estate as to render himself liable to be sued for the debts owing by the estate (*f*).

Trust for payment of debts.

586. A trust created by a testator for payment of his debts out of his personal estate is inoperative to stop the running of time (*g*), but a trust for payment of debts out of realty, or out of a blended fund of real and personal estate, enlarges the period of limitation to twelve years where the testator has left real estate (*h*): the trust is inoperative where he has left no real estate (*i*). There is nothing in the Land Transfer Act, 1897 (*j*), to render such a trust nugatory (*k*).

A devise in trust for payment of debts generally does not revive a debt which had become barred before the testator's death (*l*).

SUB-SECT. 5.—*The Right to prefer a Creditor.*

Preference after action brought.

587. As between creditors of equal degree, the representative has the right to prefer one to another. Even after an action has been commenced against him by one creditor, he may, with notice of such action, voluntarily pay another creditor (*m*), or submit to judgment in the subsequent action of another creditor (*n*).

Not after decree for administration.

A judgment or order for administration puts an end to the power of preference (*o*); but an order for an account by the representative does not (*p*). The representative will not be allowed payments made to a creditor after an administration order (*q*): if he pays a creditor he does so at his own risk, and is only entitled to stand in the place of the creditor against the estate (*r*); nor can he after the order make any admissions binding on the estate (*s*).

Nor after appointment of receiver.

The appointment of a receiver in an action puts an end to the representative's right to prefer (*t*), but the court will not appoint a

(*e*) See *Jolliffe* v. *Pitt* (1715), 2 Vern. 694.

(*f*) See *Webster* v. *Webster* (1804), 10 Ves. 93; *Flood* v. *Patterson* (1861), 29 Beav. 295. For the right to sue an executor who has acted before obtaining probate, see *Re Lovett, Ambler* v. *Lindsay* (1876), 3 Ch. D. 198.

(*g*) *Scott* v. *Jones* (1838), 4 Cl. & Fin. 382, H. L.

(*h*) *Re Stephens, Warburton* v. *Stephens* (1889), 43 Ch. D. 39; Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), ss. 8, 10; see also title LIMITATION OF ACTIONS.

(*i*) *Re Hepburn, Ex parte Smith* (1884), 14 Q. B. D. 394.

(*j*) 60 & 61 Vict. c. 65.

(*k*) *Re Balls, Trewby* v. *Balls*, [1909] 1 Ch. 791.

(*l*) *Burke* v. *Jones* (1813), 2 Ves. & B. 275.

(*m*) *Darston* v. *Orford (Earl)* (1702), Colles, 229; *Re Radcliffe, Deceased, European Assurance Society* v. *Radcliffe* (1878), 7 Ch. D. 733; *Vibart* v. *Coles* (1890), 24 Q. B. D. 364, C. A., in which case it was held that the rule of equity allowing a representative to pay one creditor after action brought by another creditor must prevail over the rule of law, which did not allow such payment.

(*n*) *Lyttleton* v. *Cross* (1824), 3 B. & C. 317, 322.

(*o*) *Davies* v. *Perry*, [1899] 1 Ch. 602, *per* ROMER, J., at p. 609.

(*p*) *Re Barrett, Whitaker* v. *Barrett* (1889), 43 Ch. D. 70. For orders for accounts, see R. S. C., Ord. 15, r. 1.

(*q*) *Mitchelson* v. *Piper* (1836), 8 Sim. 64.

(*r*) *Irby* v. *Irby* (1857), 24 Beav. 525.

(*s*) *Talbot* v. *Shrewsbury (Earl)* (1872), L. R. 14 Eq. 503.

(*t*) *Re Radcliffe, Deceased, European Assurance Society* v. *Radcliffe, supra, per* JESSEL, M.R., at p. 734.

receiver in order merely to deprive the representative of such right; the applicant for a receiver must show that the assets are being wasted (*a*).

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Now that specialty creditors have no right to be paid in priority to simple contract creditors, the representative may pay the latter without providing for the claims of the former (*b*).

Administrator precluded by bond.

Under the existing form of administrator's bond given by a creditor, the creditor's administrator is precluded from exercising his power to prefer (*c*).

SECT. 3.—*The Discharge of Liabilities not presently due.*

Contingent claims not to compete with claims presently due.

588. The representative is not entitled as against creditors to make provision for contingent liabilities: such liabilities do not constitute a debt until the contingency has arisen (*d*), and accordingly a creditor, even of inferior degree, is entitled to be paid in full, without regard to the contingency of the liability ripening into a debt (*e*).

Regard to be had to them in distribution of assets.

But the representative can only distribute the assets amongst the beneficiaries without regard to contingent liabilities at his peril. Thus, if the estate comprises shares in a joint stock company not fully paid up, and the executor pays a legacy, and a call is subsequently made upon the shares, the representative is liable to pay the amount of the legacy toward satisfaction of the call (*f*).

Statutory protection on sale of leaseholds.

589. In the case of leaseholds protection is given to the representative upon a sale. Where the representative has satisfied all liabilities which have accrued due, and have been claimed, and has set apart a sufficient fund to answer any fixed and ascertained sums covenanted to be laid out on the property, although the period for laying out the same may not have arrived, he may, after assigning the lease to a purchaser, distribute the residue of the estate amongst the parties entitled, without making any appropriation to meet any future liability under the lease, and is freed from all personal liability in respect of any future claim under the lease; the right of the lessor to follow the assets is not, however, to be prejudiced (*g*).

Order of court a complete indemnity

Where, therefore, the estate is subject to contingent liabilities, the representative ought not to distribute the assets amongst the beneficiaries without the sanction of the court. The order of the court authorising the distribution is, provided the representative

(*a*) *Philips* v. *Jones* (1884), 28 Sol. Jo. 360, C. A.; *Harris* v. *Harris* (1887), 35 W. R. 710; *Re Wells, Molony* v. *Brooke* (1890), 45 Ch. D. 569.

(*b*) Administration of Estates Act, 1869 (Hinde Palmer's Act) (32 & 33 Vict. c. 46); *Re Samson, Robbins* v. *Alexander*, [1906] 2 Ch. 584, C. A.

(*c*) See p. 207, *ante*.

(*d*) See *Re Hargreaves, Dicks* v. *Hare* (1890), 44 Ch. D. 236, C. A.

(*e*) *Lancy* v. *Fairchild* (1689), 2 Vern. 101; *Read* v. *Blunt* (1832), 5 Sim. 567.

(*f*) *Taylor* v. *Taylor* (1870), L. R. 10 Eq. 477. For his right to have the payment refunded by the legatee, see p. 278, *post*.

(*g*) Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35) (Lord St. Leonard's Act), s. 27. A similar protection is given by s. 28 of the Act in the case of a sale of property held on chief rent or rentcharge; the protection extends to property held on a fee-farm rent (*Millar* v. *Sinclair*, [1903] 1 I. R. 150). As to rights of lessor in general, see title LANDLORD AND TENANT.

SECT. 3. The Discharge of Liabilities not presently due.

keeps back nothing which ought to be disclosed to the court, a complete indemnity to the representative in respect of the consequent application of the assets (*h*), and it is therefore unnecessary for the court to retain funds in court for his protection, or, it is conceived, to direct the beneficiaries to indemnify him (*i*). But where the representative by remaining in possession of the deceased's leaseholds, renders himself liable to be sued in his personal character as assign of the term, he is entitled to be secured against the lessor's claims by retention of assets or by a proper indemnity from the beneficiaries (*k*).

Contingent creditor not secured by court.

It is not the present practice of the court to retain funds in court for the protection of a future contingent creditor (*l*), nor is such a creditor entitled to obtain an order for the administration of the estate (*m*).

SECT. 4.—*The Right of Retainer.*

SUB-SECT. 1.—*Out of what Assets.*

Nature of the right.

590. The right of retainer is a personal privilege of the representative, as against creditors of equal degree, to retain out of the legal assets of his testator or intestate sufficient to meet a debt owing to himself. The right is one recognised by the law on the ground that the representative cannot sue himself and would therefore be put in a worse position than any other creditor, who, by suing and recovering judgment, would obtain priority over the representative (*n*); the right may also be described as the correlative of the right of preference, the creditor representative having the right to prefer himself to another creditor of equal degree (*o*).

Exceptions to rule.

An executor *de son tort* cannot retain (*p*), and a creditor administrator is also precluded by the terms of his bond from retaining (*q*).

One of several representatives cannot assert his right of retainer to the prejudice of his co-representatives; where one retains all can claim the benefit (*r*).

Confined to legal assets.

The right is strictly confined to legal assets (*s*): thus the representative cannot retain out of real estate devised to him in trust for

(*h*) *Dean* v. *Allen* (1855), 20 Beav. 1; *Waller* v. *Barrett* (1857), 24 Beav. 413; *Smith* v. *Smith* (1861), 1 Drew. & Sm. 384; *Re King, Mellor* v. *South Australian Land Mortgage and Agency Co.*, [1907] 1 Ch. 72.

(*i*) *Re Nixon, Gray* v. *Bell*, [1904] 1 Ch. 638; *Re King, Mellor* v. *South Australian Land Mortgage and Agency Co., supra.*

(*k*) *Re Nixon, Gray* v. *Bell, supra.*

(*l*) *Re King, Mellor* v. *South Australian Land Mortgage and Agency Co., supra.* The judgment of NEVILLE, J., in this case reviews the prior authorities, amongst which there was some conflict of opinion. In *Fletcher* v. *Stevenson* (1844), 3 Hare, 360, it was held that the covenantee had an equity to have a fund set aside to meet a contingent claim. In *King* v. *Malcott* (1852), 9 Hare, 692; *Smith* v. *Smith* (1861), 1 Drew. & Sm. 384; and *Dodson* v. *Sammell* (1861), 1 Drew. & Sm. 575, it was held that he had no such equity.

(*m*) *Re Hargreaves, Dicks* v. *Hare* (1890), 44 Ch. D. 236.

(*n*) *Re Compton, Norton* v. *Compton* (1885), 30 Ch. D. 15, C. A., *per* COTTON, L.J., at p. 19; *Re Baker, Nichols* v. *Baker* (1890), 44 Ch. D. 262, C. A., *per* LINDLEY, L.J., at p. 272.

(*o*) *Talbot* v. *Frere* (1878), 9 Ch. D. 568, *per* JESSEL, M.R., at p. 571.

(*p*) *Curtis* v. *Vernon* (1790), 3 Term Rep. 587.

(*q*) Practice Note, [1899] W. N. 262; see p. 207, *ante.*

(*r*) *Chapman* v. *Turner, supra.*

(*s*) *Re Poole's Estate, Thompson* v. *Bennett* (1877), 46 L. J. (CH.) 803.

sale (*t*), nor out of real estate made assets in equity by statute (*u*), nor out of real estate which vests in him as personal representative (*w*).

Extends to funds in court.

591. The right, however, extends to all legal assets, whether they have come actually or constructively into the hands of the representative (*x*), including money which has been paid into court while he was representative, and which, but for such payment, would have come into his hands (*a*). The right is exercisable against funds which the representative himself has paid into court (*b*), or to a receiver appointed by the court (*c*), and there is no need to assert the right before such payment (*d*); but it is not exercisable against funds got in by a receiver (*e*). The right has priority over the costs of an action to administer the fund (*f*).

Payment in must be in lifetime of representative.

Where the representative dies before the payment into court, and his representative is not also the representative of the original testator or intestate, the foundation of the right is gone, and the last-mentioned representative has no prior claim to the fund in court (*g*).

Where estate administered in bankruptcy.

Where the estate is being administered in bankruptcy the right extends to such assets only as have come into the executor's hand either actually or constructively, before notice of a petition for an administration order (*h*).

SUB-SECT. 2.—*In respect of what Debts.*

Retainer both for legal and equitable debts.

592. A representative may retain as well for an equitable as for a legal debt. Thus the right of indemnity belonging to an executor who is surety for an unpaid debt of his testator creates an equitable debt in respect of which he may exercise his right of retainer (*i*),

(*t*) *Bain* v. *Sadler* (1871), L. R. 12 Eq. 570.

(*u*) *Walters* v. *Walters* (1881), 18 Ch. D. 182. Real estate is made assets in equity by the Administration of Estates Act, 1833 (Lord Romilly's Act) (3 & 4 Will. 4, c. 104).

(*w*) *Re Williams, Holder* v. *Williams*, [1904] 1 Ch. 52; Land Transfer Act, 1897 (60 & 61 Vict. c. 65).

(*x*) *Pulman* v. *Meadows*, [1901] 1 Ch. 233. In this case the fund in court was held never to have been in the constructive possession of the representative.

(*a*) *Richmond* v. *White* (1879), 12 Ch. D. 361, C. A.; *Re Compton, Norton* v. *Compton* (1885), 30 Ch. D. 15, C. A., *per* COTTON, L.J., at p. 19; *Re Langley, Johnson* v. *Langley*, [1899] W. N 23.

(*b*) *Chissum* v. *Dewes* (1828), 5 Russ. 29; *Langton* v. *Higgs* (1832), 5 Sim. 228.

(*c*) *Re Harrison, Latimer* v. *Harrison* (1886), 32 Ch. D. 395.

(*d*) *Stahlschmidt* v. *Lett* (1853), 1 Sm. & G. 415, *per* STUART, V.-C., at p. 420.

(*e*) *Re Jones, Calver* v. *Laxton* (1885), 31 Ch. D. 440, following (with reluctance) *Re Birt, Birt* v. *Burt* (1883), 22 Ch. D. 604.

(*f*) *Chissum* v. *Dewes, supra; Tipping* v. *Power* (1842), 1 Hare, 405.

(*g*) *Re Compton, Norton* v. *Compton, supra*, on this point overruling *Wilson* v. *Coxwell* (1883), 23 Ch. D. 764.

(*h*) *Re Williams, Ex parte Lewis and Evans* (1891), 8 Morr. 65; see also title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 214. For administration in bankruptcy of the estate of a deceased insolvent, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 93 *et seq.*

(*i*) *Re Giles, Jones* v. *Pennefather*, [1896] 1 Ch. 956. The equitable right, while the debt is unpaid, amounts only to a simple contract debt (*Ferguson* v. *Gibson* (1872), L. R. 14 Eq. 379), and the question may therefore arise whether the executor is entitled to retain in respect of such a debt as against specialty creditors; see p. 259, *post*. The executor is entitled to retain for a debt of his testator which he has discharged as surety (*Boyd* v. *Brooks* (1864), 34 Beav. 7).

SECT. 4. The Right of Retainer.

and an executor partner is entitled to retain in respect of a balance to be ascertained in chambers upon taking the partnership accounts (*k*).

Loan by wife to husband.

A married woman may retain for a loan made to her husband, although the estate is insolvent; the statutory bar which prevents her from proving for such a loan in the case of the insolvency of her husband's estate in competition with her husband's creditors for value does not affect her right to retain (*l*).

Joint debt.

The representative may retain for a debt due to himself and another jointly (*m*).

Future instalments of annuity.

593. Where the representative is an annuitant under a covenant entered into by the deceased, he cannot retain in respect of future instalments of the annuity, as such future instalments do not constitute a debt upon which he could sue (*n*), nor can he so retain where the estate is being administered by the court as an insolvent estate, though he has a right to prove for the estimated value of the future instalments (*o*).

Unascertained debts.

The right of retainer is not restricted to an ascertained debt; it extends to damages for which there is a certain standard or measure, such as damages arising from breach of contract, or from the liability to replace chattels; it does not, however, extend to damages which are in their nature arbitrary, such as damages founded upon torts (*p*).

Statute-barred debts.

594. A representative may retain in respect of a statute-barred debt (*q*), but this right is an exception to the general rule that it is a *devastavit* if the representative pay that which need not be paid, and is not to be extended to the case of a debt to which the Statute of Frauds is a defence (*r*).

Debts due to representative as representative.

595. The right is not restricted to a debt due to the representative personally; a person who is the representative of two estates, one of which is indebted to the other, is entitled to retain on behalf of the creditor estate (*s*), but he cannot be compelled to do so where

(*k*) *Re Morris's Estate, Morris* v. *Morris* (1874), 10 Ch. App. 68.

(*l*) *Re Ambler, Woodhead* v. *Ambler*, [1905] 1 Ch. 697, C. A., following the principles laid down in *Re May, Crawford* v. *May* (1890), 45 Ch. D. 449; and *Re Leng, Tarn* v. *Emmerson*, [1895] 1 Ch. 652, C. A. For the statutory bar, see the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 3, and title HUSBAND AND WIFE.

(*m*) *Re Morris's Estate, Morris* v. *Morris, supra; Crowder* v. *Stewart* (1880), 16 Ch. D. 368; *Re Hubback, International Marine Hydropathic Co.* v. *Hawes* (1885), 29 Ch. D. 934, C. A.

(*n*) See *Re Hargreaves, Dicks* v. *Hare* (1890), 44 Ch. D. 236, C. A.

(*o*) *Re Beeman, Fowler* v. *James*, [1896] 1 Ch. 48.

(*p*) *Loane* v. *Casey* (1775), 2 Wm. Bl. 965; *Re Compton, Norton* v. *Compton* (1885), 30 Ch. D. 15, C. A.; see, too, *Re Morris's Estate, Morris* v. *Morris, supra.*

(*q*) *Stahlschmidt* v. *Lett* (1853), 1 Sm. & G. 415; *Hill* v. *Walker* (1858), 4 K. & J. 166, disapproving of a *dictum* of BAYLEY, J., in *M'Culloch* v. *Dawes* (1826), 9 Dow. & Ry. (K. B.) 40, 43; *Sharman* v. *Rudd* (1858), 27 L. J. (CH.) 844; *Clinton* v. *Brophy* (1847), 10 I. Eq. R. 139. For barring of debts by Statutes of Limitation, see title LIMITATION OF ACTIONS.

(*r*) *Re Rownson, Field* v. *White* (1885), 29 Ch. D. 358, C. A.; see note (*t*), p. 251, *ante.*

(*s*) *Thompson* v. *Cooper* (1844), 1 Coll. 81, 85; *Wynch* v. *Grant* (1854), 24 L. J. (CH.) 6.

the debt is equitable (*t*). So, too, the executor of an executor is entitled to retain for a debt owing by the original testator to his executor, if he himself represents the original testator (*a*); but if he does not himself represent the original testator his right of retainer is restricted to such of the assets of the latter as came into the hands, either actually or constructively, of his immediate testator (*b*).

Debts due to representative as trustee.

596. The representative of a sole surviving trustee who dies indebted to the trust estate is entitled to retain in respect of the debt due to the trust estate (*c*), and if he himself acts as trustee he can be compelled by the beneficiaries to retain (*d*); but he is not bound to act as trustee (*e*), and if he refuses to do so he cannot be compelled to retain (*f*).

Debts due to third party as trustee for representative.

597. In the converse case the representative may retain for money due from the deceased to a third party in trust for the representative (*g*), but the trust must be an absolute trust for the representative; if the representative has only a limited interest in the trust fund he cannot retain (*h*).

Debts due to person having obtained grant of administration on behalf of another.

598. A person who has obtained a grant of administration on behalf of an infant or a lunatic may retain either for a debt due to himself (*i*) or to the person on whose behalf he holds the grant (*k*); but a person who being manager of a body corporate obtains a grant on behalf of but not expressed to be for the use of the corporation cannot retain for a debt due to it (*l*).

Against whom right exercisable.

599. The right is exercisable only as against creditors of equal degree. Where the executor is a simple contract creditor, it has been held that he cannot retain as against specialty creditors (*m*);

(*t*) See *Re Benett, Ward* v. *Benett*, [1906] 1 Ch. 216, C. A., discussing on this point *Fox* v. *Garrett, Mills* v. *Fox* (No. 1) (1860), 28 Beav. 16; and *Re Owen* (1889), 23 L. R. Ir. 328.

(*a*) *Hopton* v. *Dryden* (1700), Prec. Ch. 179; *Thomson* v. *Grant* (1823), cited 1 Russ. 540.

(*b*) *Re Compton, Norton* v. *Compton* (1885), 30 Ch. D. 15, C. A., qualifying n this respect *Wilson* v. *Coxwell* (1883), 23 Ch. D. 764.

(*c*) *Plumer* v. *Marchant* (1763), 3 Burr. 1380; *Sander* v. *Heathfield* (1874), L. R. 19 Eq. 21; *Re Faithfull, Re Sutton, Hardwick* v. *Sutton* (1887), 57 L. T. 14.

(*d*) *Davies* v. *Parry*, [1899] 1 Ch. 602, *per* ROMER, J., at p. 609; *Re Benett, Ward* v. *Benett, supra, per* COZENS-HARDY, L.J., at p. 233, explaining the decision of ROMER, J., in *Davies* v. *Parry, supra.*

(*e*) *Legg* v. *Mackrell* (1860), 2 De G. F. & J. 551; *Re Ridley, Ridley* v. *Ridley*, [1904] 2 Ch. 774.

(*f*) *Re Ridley, Ridley* v. *Ridley, supra; Re Benett, Ward* v. *Bennett, supra.*

(*g*) *Cockroft* v. *Black* (1725), 2 P. Wms. 298.

(*h*) *Re Dunning, Hatherley* v. *Dunning* (1885), 54 L. J. (CH.) 900. *Re Hayward, Tweedie* v. *Hayward*, [1901] 1 Ch. 221, deciding that *Loomes* v. *Stothard* (1823), 1 Sim. & St. 458, must be treated on this point as overruled.

(*i*) Com. Dig., tit. Administration (F).

(*k*) *Franks* v. *Cooper* (1799), 4 Ves. 763.

(*l*) *Re Richards, Lawson* v. *Harvey*, [1901] 2 Ch. 399.

(*m*) *Wilson* v. *Coxwell* (1883), 23 Ch. D. 764; *Re Jones, Calver* v. *Laxton* (1885), 31 Ch. D. 440; *Re Briggs, Earp* v. *Briggs*, [1894] W. N. 162; *Re Bentinck, Bentinck* v. *Bentinck*, [1897] 1 Ch. 673. Notwithstanding the judgments delivered by the Court of Appeal in *Re Samson, Robbins* v. *Alexander*,

SECT. 4. The Right of Retainer.

but a retainer by an executor without notice of a debt of higher degree will not be disturbed, nor has the creditor of higher degree any right to follow the assets retained (*n*).

SUB-SECT. 3.—*When and how to be exercised.*

When right to be exercised.

600. The representative's right of retainer is a mere passive right. He does not lose the right because he has done nothing to assert it before there was any occasion to do so: it is only when someone seeks to take assets out of his possession that it becomes necessary for him to assert his right (*o*).

Not barred by decree for administration.

He is entitled to exercise it after a full judgment for the administration of the estate has been made (*a*), even when he himself has instituted the administration proceedings and has submitted to account (*b*). Where an order has been made for the administration of the estate of an insolvent testator in bankruptcy, thus vesting the estate in the official receiver (*c*), the executor is not deprived of the right to withdraw from distribution assets in his possession which he has a right to retain (*d*), nor is he deprived of that right where, in ignorance thereof, he has paid over the assets to the official receiver and proved for his debt in bankruptcy, if on discovering his error he withdraws his proof (*e*).

May be lost by waiver.

601. The representative may, however, have so conducted himself as to have waived his right (*f*), and if in an action at law brought by a creditor of the deceased he fails to assert his right to retain either by a plea of retainer or by giving the retainer in evidence under a plea of *plene administravit*, and judgment goes against him, he cannot subsequently set up his right against the judgment creditor (*g*).

[1906] 2 Ch. 584, C. A., the necessary inference from which is that the principle ought to be extended to the right of retainer, it would appear still to be the duty of a court of first instance to hold that the representative cannot retain for a simple contract debt as against specialty creditors (*Re Jennes, Oetzes* v. *Jennes* (1909), 53 Sol. Jo. 376, per NEVILLE, J.).

(*n*) *Re Fludyer, Wingfield* v. *Erskine*, [1898] 2 Ch. 562.

(*o*) *Stahlschmidt* v. *Lett* (1853), 1 Sm. & G. 415, *per* STUART, V.-C., at p. 419; *Re Rhoades, Ex parte Rhoades*, [1899] 2 Q. B. 347, C. A., *per* LINDLEY, M.R., at p. 353. "The old common law authorities go far to show that if an executor was a creditor of his deceased testator, and had assets in his hands sufficient to pay the debt (and all others of a higher degree if any), such debt was treated as extinguished" (*ibid.*, *per* LINDLEY, M.R., at p. 352, referring to 3 Bl. Com., 4th ed., p. 18, and *Woodward* v. *Darcy* (*Lord*) (1558), 1 Plowd. 184; but see *Lowe* v. *Peskett* (1855), 16 C. B. 500).

(*a*) *Nunn* v. *Barlow* (1824), 1 Sim. & St. 588; *Sharman* v. *Rudd* (1858), 27 L. J. (CH.) 844.

(*b*) *Campbell* v. *Campbell, Ex parte Campbell* (1880), 16 Ch. D. 198.

(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 125.

(*d*) *Re Rhoades, Ex parte Rhoades*, [1899] 2 Q. B. 347, C. A.

(*e*) *Ibid.* A payment made to an officer of the court in mistake, though attributable to ignorance of the law, will be set right by the court, so long as the officer of the court still has the moneys in his hands (*Re Condon, Ex parte James* (1874), 9 Ch. App. 609, C. A.; *Re Carnac, Ex parte Simmonds* (1885), 16 Q. B. D. 308, C. A.).

(*f*) See *Player* v. *Foxhall* (1826), 1 Russ. 538, and *Trevor* v. *Hutchins*, [1896] 1 Ch. 844, C. A.

(*g*) *Re Marvin, Crawter* v. *Marvin*, [1905] 2 Ch. 490.

SECT. 4. The Right of Retainer.

602. When the debt due to an executor exceeds the value of the testator's assets, the executor is not bound to realise the assets before exercising his right of retainer, but is entitled to retain the assets *in specie* in satisfaction of his debt (*h*).

Right to retain assets *in specie*.

SECT. 5.—*Legacies.*

SUB-SECT. 1.—*In General.*

603. Legacies are ordinarily divided into two classes, namely, specific legacies and general legacies: the latter class are also described as legacies of quantity or number (*i*). A specific legacy must be of something forming part of the testator's estate: it must be a part as distinguished from the whole of his personal property or from the whole of the general residue of his personal estate; it must be identified by a sufficient description, and separated in favour of the particular legatee from the general mass of the testator's personal estate (*k*).

Distinction between general and specific legacies.

A general legacy, on the other hand, may or may not be part of the testator's property: it has no reference to the actual state of his property, and is a gift of something which, in the event of the testator leaving sufficient assets, must be raised by his executors out of his general personal estate. Whether or not a particular thing forms part of the testator's personal estate is a pure question of fact: so long as it is the testator's at his death it is capable of being specifically bequeathed (*l*). Whether or not it has been separated from the general personal estate depends upon the true construction of the will. In the case of real estate a devise, whether of a specific property or by way of residue, is specific (*m*).

604. There is a third kind of legacy called a demonstrative legacy, which consists of a pecuniary legacy payable out of a particular fund. Such a legacy has the following advantages—namely, (1) it is not adeemed by the total or partial failure at the testator's death of the fund out of which it was directed to be paid, but becomes payable out of the general personal estate to the extent of such failure, *pari passu* with ordinary general legacies (*n*); and (2) it does not abate with the general legacies until after the particular fund is exhausted (*o*).

Demonstrative legacies.

(*h*) *Re Gilbert, Ex parte Gilbert*, [1898] 1 Q. B. 282, discussing *Woodward* v. *Darcy* (*Lord*) (1558), 1 Plowd. 184, and *Chapman* v. *Turner* (1739), 9 Mod. Rep. 268.

(*i*) Swinburn on Wills, 7th ed., 308.

(*k*) *Bothamley* v. *Sherson* (1875), L. R. 20 Eq. 304, *per* JESSEL, M.R., at p. 308; *Robertson* v. *Broadbent* (1883), 8 App. Cas. 812, *per* Lord SELBORNE, L.C., at p. 815.

(*l*) *Fontaine* v. *Tyler* (1821), 9 Price, 94; *Stephenson* v. *Dowson* (1840), 3 Beav. 342.

(*m*) *Hensman* v. *Fryer* (1867), 3 Ch. App. 420; *Lancefield* v. *Iggulden* (1874), 10 Ch. App. 136.

(*n*) *Roberts* v. *Pocock* (1798), 4 Ves. 150; *Mann* v. *Copland* (1817), 2 Madd. 223; *Fowler* v. *Willoughby* (1825), 2 Sim. & St. 354. As to ademption of legacies, see title WILLS.

(*o*) *Mullins* v. *Smith* (1860), 1 Drew. & Sm. 204.

SECT. 5. **Legacies.**

Failure of legacy.

605. A legacy may fail on any of the following grounds—namely, uncertainty, death of the legatee in the testator's lifetime, ademption, satisfaction, attestation of the will by the legatee, and non-fulfilment of a condition (*p*).

SUB-SECT. 2.—*Payment.*

Executor need not give notice to legatee.

606. An executor is under no obligation to give notice to a legatee of a condition attached to his legacy, even though he may derive a personal benefit on the breach of the condition by the legatee (*q*).

The executor's year.

The executor has a year within which fully to inform himself of the state of the testator's property, and during that period he cannot be required to pay any legacies, even though they are expressly directed by the testator to be payable within the year (*r*); he is, however, entitled to pay them within the year if he chooses (*s*).

Annuities run from the death.

607. An annuity given by will runs from the death of the testator (*t*), but the first instalment, in the absence of a direction to the contrary (*a*), does not become due until the expiration of the year; nor does a sum of money directed to be invested in the purchase of an annuity carry interest before the expiration of the year (*b*).

An annuitant's rights.

An annuitant is not entitled to have the residuary estate kept in hand to meet his annuity; he is only entitled to such security as will make it practically certain that his annuity will be paid in full (*c*).

Bequest for purchase of annuity.

Money bequeathed to be invested in the purchase of an annuity for the life of the legatee is a vested legacy, and the legatee may either take the sum or have it laid out in an annuity. Should the legatee survive the testator but die before the money is laid out, or even before the fund is available—as during the life of a person after whose death the investment is to be made (*d*)—it is still a vested legacy, and may be claimed by his personal representatives (*e*).

(*p*) For failure of legacies, see title WILLS.

(*q*) *Re Lewis, Lewis* v. *Lewis*, [1904] 2 Ch. 656, C. A.; *Re Mackay, Mackay* v. *Gould*, [1906] 1 Ch. 25.

(*r*) *Pearson* v. *Pearson* (1802), 1 Sch. & Lef. 10; *Wood* v. *Penoyre* (1807), 13 Ves. 325, 333; *Benson* v. *Maude* (1821), Madd. & G. 15.

(*s*) *Garthshore* v. *Chalie* (1804), 10 Ves. 1, 13; *Angerstein* v. *Martin* (1823), Turn. & R. 232, at p. 241.

(*t*) *Gibson* v. *Bott* (1802), 7 Ves. 89, 96; *Stamper* v. *Pickering* (1838), 9 Sim. 176. As to annuities generally, see title RENTCHARGES AND ANNUITIES.

(*a*) *Houghton* v. *Franklin* (1823), 1 Sim. & St. 390; *Irwin* v. *Ironmonger* (1831), 2 Russ. & M. 531.

(*b*) *Re Friend, Friend* v. *Young* (No. 2) (1898), 78 L. T. 222.

(*c*) *Re Parry, Scott* v. *Leak* (1889), 42 Ch. D. 570; see, too, *Harbin* v. *Masterman*, [1896] 1 Ch. 351, C. A.

(*d*) *Bayley* v. *Bishop* (1803), 9 Ves. 6.

(*e*) *Yates* v. *Compton* (1725), 2 P. Wms. 308; *Barnes* v. *Rowley* (1797), 3 Ves. 305; *Palmer* v. *Craufurd* (1819), 3 Swan. 482. The setting aside by the court of a fund to meet annuities or legacies charged on residuary estate is an administration act only, and does not release the residue from the charge (*Re Evans and Bettell's Contract*, [1910] 2 Ch. 438).

The same principle applies to a direction to purchase an annuity of a particular amount. The right to take its value in cash instead of the annual payment vests in the annuitant on the testator's death, and should the annuitant die before the annuity is purchased, his personal representatives are entitled to such a sum as would, at the testator's death, have purchased the annuity (*f*).

Contingent legacies.

608. The right of a contingent legatee is limited in a manner similar to that of an annuitant. His only right is to have security for the payment of his legacy if the contingency arises (*g*). If an executor, without going to the court, can prove that he has acted reasonably, and that he has set apart an ample sum to answer the legacy and has invested it, and has then proceeded to distribute the residue, he will not be held personally liable to make good the loss if it should turn out that the sum so retained is not sufficient to answer the contingent legacy (*h*).

Specific legacies should be preserved.

609. An executor should, so far as possible, preserve articles specifically bequeathed, and, unless compelled, he ought not to apply them in payment of debts (*i*). The cost of getting in a legacy specifically bequeathed ought to be borne by the general estate (*k*), but the cost of warehousing and preserving, pending distribution of assets, articles specifically bequeathed, in the absence of a direction to the contrary, ought to be borne by the specific legatee (*l*). A direction that the testator's testamentary expenses should be borne by his general personal estate is sufficient to throw such expenses on the general personal estate (*m*).

Absolute bequest of money with directions as to application.

610. Where there is a bequest of money to or in trust for a legatee absolutely, but with a direction for the enjoyment or application of the money in a particular mode, as towards purchasing a country residence, the legatee is entitled to receive the money regardless of the particular mode directed for its enjoyment or application (*n*).

(*f*) *Dawson* v. *Hearn* (1831), 1 Russ. & M. 606; *Re Robbins, Robbins* v. *Legge*, [1907] 2 Ch. 8, C. A. When the annuitant dies before the purchase of the annuity, but after payment to him of instalments of the annuity, his representatives are entitled to such a sum as would have purchased the annuity on the date of the payment of the last instalment, together with interest at 4 per cent. on that sum from that date, even though the date falls within a year of the testator's death (*Re Brunning, Gammon* v. *Dale*, [1909] 1 Ch. 276).

(*g*) *Webber* v. *Webber* (1823), 1 Sim. & St. 311; *King* v. *Malcott* (1852), 9 Hare, 692.

(*h*) *Re Hall, Foster* v. *Metcalfe*, [1903] 2 Ch. 226, C. A., *per* ROMER, L.J., at p. 233.

(*i*) *Clarke* v. *Ormonde* (*Earl*) (1821), Jac. 108.

(*k*) *Perry* v. *Meddowcroft* (1841), 4 Beav. 197, 204.

(*l*) *Re Pearce, Crutchley* v. *Wells*, [1909] 1 Ch. 819.

(*m*) *Sharp* v. *Lush* (1879), 10 Ch. D. 468. As to what is to be included under a direction for payment of testamentary expenses, see titles ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 219; WILLS.

(*n*) *Knox* v. *Hotham* (*Lord*) (1845), 15 Sim. 82; *Lassence* v. *Tierney* (1849), 1 Mac. & G. 551; *Re Skinner's Trusts* (1860), 1 John. & H. 102; see, too, *Barlow* v. *Grant* (1684), 1 Vern. 255; *Nevill* v. *Nevill* (1702), 2 Vern. 431; *Barton* v. *Cooke* (1800), 5 Ves. 461, at p. 463, as to the right of an infant to a sum directed to be applied in placing him out as an apprentice.

SECT. 5. **Legacies.**

Payment of a vested gift not to be postponed.

611. Similarly where a legatee takes an absolute vested interest in a sum of money on attaining the age of twenty-one, a direction that the sum is not to be paid to him (*o*), or is to be accumulated (*p*) until a subsequent period, is to be disregarded, unless during the interval the property is given to another. The principle is equally applicable where the legatee is a charity, corporate or unincorporate (*q*).

Limitation of proceedings for recovery of legacy.

612. Proceedings for the recovery of a legacy are barred after twelve years next after a present right to receive the same has accrued to a legatee capable of giving a discharge for or release of the legacy; in the case of part payment or acknowledgment a further period of twelve years is allowed (*r*). In the case of an immediate legacy to a person *sui juris*, time begins to run from the death of the testator, and not from the expiration of one year after the death (*s*); but time does not begin to run in respect of reversionary interests belonging to the testator until they have come into the possession of the representative (*t*).

Effect of lapse of time upon annuity.

613. The gift of an annuity out of personal estate amounts to a gift of successive legacies, and time begins to run against each instalment only from the date at which such instalment becomes payable (*a*); but where the annuity is charged upon real estate it amounts to a rent for the purpose of the Statutes of Limitation, and after non-payment for twelve years the right to the annuity is lost (*b*).

Legacy held by executor upon express trust.

614. The twelve-year limitation does not apply to a legacy held by an executor upon an express trust; but it is necessary for the

(*o*) *Curtis* v. *Lukin* (1842), 5 Beav. 147, 155; *Rocke* v. *Rocke* (1845), 9 Beav. 66; *Re Johnston, Mills* v. *Johnston*, [1894] 3 Ch. 204; *Re Couturier, Couturier* v. *Shea*, [1907] 1 Ch. 470.

(*p*) *Josselyn* v. *Josselyn* (1837), 9 Sim. 63; *Saunders* v. *Vautier* (1841), 4 Beav. 115; *Gosling* v. *Gosling* (1859), John. 265.

(*q*) *Harbin* v. *Masterman*, [1894] 2 Ch. 184, C. A.; affirmed, *sub nom. Wharton* v. *Masterman*, [1895] A. C. 186; see also title CHARITIES, Vol. IV., p. 157.

(*r*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8; see also title LIMITATION OF ACTIONS.

(*s*) *Waddell* v. *Harshaw*, [1905] 1 I. R. 416, C. A., disapproving a *dictum* of ROMILLY, M.R., in *Earle* v. *Bellingham* (No. 2) (1857), 24 Beav. 448, at p. 450, and holding, in accordance with *Hornsey Local Board* v. *Monarch Investment Building Society* (1889), 24 Q. B. D. 1, C. A., that a present right to receive is not equivalent to a present right to enforce payment. The interpretation placed by KEKEWICH, J., in *Re Pardoe, McLaughlin* v. *Penny*, [1906] 1 Ch. 265, reversed on another point, [1906] 2 Ch. 340, C. A., upon the same words in the Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), s. 13, is in direct conflict with the interpretation placed upon the words in the case of *Hornsey Local Board* v. *Monarch Investment Building Society*, *supra*.

(*t*) *Adams* v. *Barry* (1845), 2 Coll. 285, 290; *Re Ludlam, Ludlam* v. *Ludlam* (1890), 63 L. T. 329, 332. As to a share under an intestacy, see pp. 284, 285, *post*.

(*a*) *Roch* v. *Callen* (1848), 6 Hare, 531; *Dower* v. *Dower* (1885), 15 L. R. Ir. 264; see *Re Ashwell's Will* (1859), John. 112; *Jones* v. *Withers* (1896), 74 L. T. 572, C. A.

(*b*) *Dower* v. *Dower*, *supra*, commenting upon *Hughes* v. *Coles* (1884), 27 Ch. D. 231. For the effect of lapse of time upon the recovery of rents, see Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1, and title LIMITATION OF ACTIONS; and as to annuities generally, see title RENTCHARGES AND ANNUITIES.

legatee to make out that the executor is an express trustee. The fact that the legacy is subject to some implied trusts does not deprive the executor of the benefit of the twelve years' limitation (*c*).

Claim against executor-trustee.

Where an executor-trustee is *functus officio* as executor, and has become a trustee of a fund upon the trusts declared by the will, a claim against him in respect of that fund is barred at the expiration of six years, except where it is founded upon any fraud or fraudulent breach of trust to which he was party or privy, or is to recover trust property or the proceeds thereof still retained by him, or previously received by him and converted to his use (*d*).

Remedy against land charged with legacy.

As against the land upon which a legacy may be secured, whether by charge or by an express trust, the remedy of the legatee is barred at the expiration of twelve years (*e*), notwithstanding that throughout that period the testator's interest in the land may have been reversionary (*f*), or subject to prior incumbrances (*g*).

Payment to bankrupt legatee without notice.

615. Payment of a legacy without notice of his bankruptcy to a bankrupt legatee before the trustee in bankruptcy has intervened is good (*h*).

SUB-SECT. 3.—*Assent.*

Necessity for assent.

616. The bequest of a legacy, whether it be general or specific, transfers only an inchoate property to the legatee; to render it complete and perfect the assent of the executor is requisite (*i*). The right is one which will devolve upon the legatee's personal representatives, should he die before the assent is given (*k*). In the case of a release by will of a debt, the assent of the executor is necessary, as the release in effect amounts to a legacy of the debt (*l*).

In case of residue vested in representative.

The necessity for assent applies to residuary bequests, and the executor may assent to part of a residuary gift without assenting to the whole (*m*). The doctrine which always applied to chattels real has been extended to real estate which vests in the personal representative (*n*).

When a condition may be attached to assent.

617. An executor has no power to attach as a condition to his assent the performance of some subsequent act by the legatee,

(*c*) *Re Davis* (*Jane*), *Re Davis* (*T. H.*), *Evans* v. *Moore*, [1891] 3 Ch. 119, C. A.; *Re Barker*, *Buxton* v. *Campbell*, [1892] 2 Ch. 491. The twelve years limitation for the recovery of a legacy charged upon land and secured by an express trust, provided by s. 10 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), applies only as against the land on which the legacy is charged.

(*d*) Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8; *Re Swain*, *Swain* v. *Bringeman*, [1891] 3 Ch. 233; *Re Page*, *Jones* v. *Morgan*, [1893] 1 Ch. 304; *Re Timmis*, *Nixon* v. *Smith*, [1902] 1 Ch. 176.

(*e*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), ss. 8, 10; see generally on the subject, title LIMITATION OF ACTIONS.

(*f*) *Re Owen*, [1894] 3 Ch. 220.

(*g*) *Proud* v. *Proud* (1862), 11 W. R. 101. In the case of *Faulkner* v. *Daniel* (1843), 3 Hare, 199, no question of statutory limitation arose.

(*h*) *Re Ball*, [1899] 2 I. R. 313, C. A.

(*i*) Toller, Law of Executors, 306.

(*k*) Went. Off. Ex., 14th ed., at p. 69.

(*l*) *Sibthorp* v. *Moxton* (1747), 1 Ves. Sen. 49, *per* Lord HARDWICKE, L.C., at p. 50.

(*m*) *Austin* v. *Beddoe* (1893), 41 W. R. 619; but see *Elliott* v. *Elliott* (1841), 9 M. & W. 23, *per* PARKE, B., at p. 27.

(*n*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 3 (1).

SECT. 5. Legacies.

though he may apparently agree to give his assent upon the performance of a condition precedent (*o*). In the case of real estate the personal representatives may assent or convey subject to a charge for the payment of any money which they are liable to pay (*p*).

Effect of assent.

The assent once given is irrevocable (*q*), and the title to the thing bequeathed vests immediately upon the assent in the legatee, so as to enable him to bring an action at law against the executor or any other person in possession of the bequest (*r*). The assent relates back to the testator's death (*s*), and the legatee has the right to recover the intermediate profits of the thing bequeathed (*t*).

Assent by implication.

618. The assent may be express or implied; it need not be in writing, nor need it be given in any particular form (*a*). Informal expressions, if sufficiently clear to indicate intention, may amount to an assent (*b*). The assent may also be implied from the conduct of the executor. Thus the application, in the maintenance of infants, of rents of leaseholds bequeathed to the executor in trust for maintaining them during minority and afterwards in trust for the legatee on attaining his majority (*c*), allowing a legatee of a term to receive the rents and profits (*d*), the payment by the executor of rent, coupled with the charging of the legatee with the payments in account (*e*), the payment of a charge subject to which the legacy is given (*f*), would amount to an assent to the bequest. But the mere fact that the executor has made general payments for the benefit of a legatee of leaseholds and other property, not specially out of or on account of the rents, is not, in the absence of representations on the subject by the executor to the legatee, sufficient to enable the court to infer an assent (*g*).

(*o*) Went. Off. Ex., 14th ed., p. 429.

(*p*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 3 (1). The charge does not extend to debts for which, prior to the Act, the personal representatives of the debtor would not have been liable if they had parted with the whole personal estate, and therefore where the personal representatives have given the usual statutory notices to creditors, the charge does not apply to debts of which they have no notice at the date of the conveyance to the devisees (*Re Cary and Lott's Contract*, [1901] 2 Ch. 463).

(*q*) *Noell* v. *Robinson* (1681), 2 Vent. 358.

(*r*) *Saunders's Case* (1600), 5 Co. Rep. 12 b; *Williams* v. *Lee* (1745), 3 Atk. 223; *Doe* d. *Saye and Sele* (*Lord*) v. *Guy* (1802), 3 East, 120; *Re Culverhouse, Cook* v. *Culverhouse*, [1896] 2 Ch. 251. An action at law cannot be brought against an executor upon a promise to pay a general legacy (*Jones* v. *Tanner* (1827), 7 B. & C. 542). As to a legatee's rights to institute administration proceedings, see pp. 335 *et seq.*, *post.*

(*s*) Went. Off. Ex., 14th ed., 445.

(*t*) *Re West, West* v. *Roberts*, [1909] 2 Ch. 180.

(*a*) In the case of registered land, the assent must be in a prescribed form to authorise the registrar to register the person named in the assent as proprietor of the land (Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 3 (4)). For prescribed form, see Land Transfer Rules (Consolidated Rules), 1903, Sched. I., Form 51; see also title REAL PROPERTY AND CHATTELS REAL.

(*b*) For instances, see *Doe* d. *Sturges* v. *Tatchell* (1832), 3 B. & Ad. 675; *Barnard* v. *Pumfrett* (1841), 5 My. & Cr. 63; and Com. Dig., tit. Administration, C (6).

(*c*) *Paramour* v. *Yardley* (1579), 2 Plowd. 539.

(*d*) Went. Off. Ex., 14th ed., p. 414.

(*e*) *Doe* d. *Mabberley* v. *Mabberley* (1833), 6 C. & P. 126.

(*f*) *Young* v. *Holmes* (1717), 1 Stra. 70.

(*g*) *Thorne* v. *Thorne*, [1893] 3 Ch. 196.

In case of dispute the question whether there has been an assent or not is generally one of fact to be left to the jury (*h*); but where the question turns upon an expression which is ambiguous, and applies equally to either view, it is no evidence at all for the jury (*i*). Question of fact for jury.

An assent to a life interest is an assent to the interest in remainder, and conversely an assent to an interest in remainder enures for the benefit of the tenant for life (*k*). Assent to limited interest.

619. In the case of a gift to the executor assent is equally necessary, and the assent may be either express or implied (*l*). If the executor in his manner of administering the property does any act which shows that he regards himself as owning it beneficially, that is to be taken as evidence of his assent; but if his acts are referable to his character of executor, they are not evidence of assent (*m*). Gift to executor.

Where a term has been bequeathed to an executor for his life, mere entry into possession is not sufficient to amount to an assent (*n*). Such an assent would amount to an assent to the bequest in remainder (*o*), and thereby prevent the executor from availing himself of the estate in remainder for the purpose of paying debts or legacies (*p*). A similar rule applies to a gift to an executor of a life interest in furniture (*q*). Gift to executor for life only.

620. The assent of one of several representatives to a bequest of personalty is sufficient (*r*), even though the bequest be to himself (*s*); but in the case of real estate the concurrence of all the personal representatives in whom such estate is vested would appear to be necessary (*t*). Where several representatives.

An executor may assent before probate (*a*), and the assent will not be affected by his dying without having obtained probate (*b*). Assent before probate.

(*h*) *Elliott* v. *Elliott* (1841), 9 M. & W. 23, 27; *Mason* v. *Farnell* (1844), 12 M. & W. 674.

(*i*) *Doe* d. *Chidgey* v. *Harris* (1847), 16 M. & W. 517, *per* ALDERSON, B., at p. 520.

(*k*) Went. Off. Ex., 14th ed., 426; *Adams* v. *Peirce* (1724), 3 P. Wms. 11; *Stevenson* v. *Liverpool Corporation* (1874), L. R. 10 Q. B. 81; Com. Dig., tit. Administration, C (6).

(*l*) Toller, Law of Executors, 345.

(*m*) *Doe* d. *Hayes* v. *Sturges* (1816), 7 Taunt. 217, *per* GIBBS, C.J., at p. 223. In *Fenton* v. *Clegg* (1854), 9 Exch. 680, an entry by an executor into possession of a leasehold, and a disposition of it by his will, were held to amount to an assent to the bequest to himself.

(*n*) *Doe* d. *Hayes* v. *Sturges*, *supra*; *Doe* d. *Sturges* v. *Tatchell* (1832), 3 B. & Ad. 675, 680.

(*o*) See note (*k*), *supra*; *Trail* v. *Bull* (1853), 22 L. J. (CH.) 1082, *per* Lord CRANWORTH, at p. 1083.

(*p*) *Doe* d. *Hayes* v. *Sturges*, *supra*, at p. 221; *A.-G.* v. *Potter* (1842), 5 Beav. 64.

(*q*) *Richards* v. *Browne* (1837), 3 Bing. (N. C.) 493.

(*r*) Went. Off. Ex., 14th ed., 413.

(*s*) *Townson* v. *Tickell* (1819), 3 B. & Ald. 31, 40.

(*t*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 3 (2). This applies even to an executor who has not proved, provided he has not renounced (*Re Pawley and London and Provincial Bank*, [1900] 1 Ch. 58); see also p. 298, *post*.

(*a*) Went. Off. Ex., 14th ed., 82.

(*b*) *Ibid.*; *Brazier* v. *Hudson* (1836), 8 Sim. 67. As to executor's liability to be sued, see pp. 145, 254, 266, *ante*; and as to actions by and against representative, see p. 330, *post*.

SECT. 5. **Legacies.**

Executor may be compelled to assent.

An executor may be compelled by the legatee to assent, should he refuse to do so without just cause (*c*). In the case of real estate, at any time after the expiration of one year from the death, if the personal representatives have failed on the request of the person entitled to the land to convey it, the court has power, after notice to the personal representatives, to order the conveyance to be made (*d*). The personal representatives are, however, entitled to assent to a devise in preference to executing a conveyance to the devisee (*e*), and cannot be required to describe the land in more precise terms than those contained in the will (*f*). In the case of intestacy a conveyance must be executed (*g*).

Stamp on assent.

An assent under hand only, whether in respect of real or personal estate, does not require to be stamped (*h*); if under seal, it requires a stamp of 10*s*. (*i*).

SUB-SECT. 4.—*To a Debtor.*

General legatee must bring debt into account.

621. Where the legatee of a general legacy or share of residue is a debtor to the estate, he is not entitled to receive his legacy without bringing his debt into account (*j*).

But not specific legatee or devisee.

This principle is not applicable in the case of a specific devisee or of a specific legatee of leaseholds or chattels (*k*), but is applicable where the specific legacy is represented by a sum of money in the hands of the executor (*l*). It is not applicable to a legacy which has been appropriated by the executor for the legatee (*m*).

It applies though the legacy has been incumbered (*n*), and although the debt is statute-barred (*o*); it does not apply where the

(*c*) Went. Off. Ex., 14th ed., p. 70.

(*d*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 3 (2). In the case of registered land the court may order that the person entitled be registered as proprietor of the land, either solely or jointly with the personal representatives (*ibid.*); see also title REAL PROPERTY AND CHATTELS REAL.

(*e*) *Pe Pix, Plomley* v. *Stileman*, [1901] W. N. 165.

(*f*) *Ibid.*

(*g*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 3 (1). The question by whom the expense of the assent or conveyance is to be borne has not been judicially determined.

(*h*) *Kemp* v. *Inland Revenue Commissioners*, [1905] 1 K. B. 581.

(*i*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 62, and Sched. I.

(*j*) *Cherry* v. *Boultbee* (1839), 4 My. & Cr. 442; *Re Akerman, Akerman* v. *Akerman*, [1891] 3 Ch. 212. The executor's right is often called a right of "set-off" or "retainer," and though these expressions are inaccurate (see *per* Lord COTTENHAM, L.C., in *Cherry* v. *Boultbee, supra*, and *per* KEKEWICH, J., in *Re Akerman, Akerman* v. *Akerman, supra*), there does not appear to be any other expression accurately describing the right; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 214. As to equitable set-off, see title EQUITY, Vol. XIII., p. 161; and as to set-off generally, see title SET-OFF AND COUNTERCLAIM. As to satisfaction of debts and portions by legacies, see titles EQUITY, Vol. XIII., p. 128; WILLS.

(*k*) *Re Akerman, Akerman* v. *Akerman, supra.*

(*l*) *Re Taylor, Taylor* v. *Wade*, [1894] 1 Ch. 671.

(*m*) *Ballard* v. *Marsden* (1880), 14 Ch. D. 374.

(*n*) *Re Knapman, Knapman* v. *Wreford* (1881), 18 Ch. D. 300, C. A.

(*o*) *Courtnay* v. *Williams* (1846), 15 L. J. (CH.) 204; *Coates* v. *Coates* (1864), 33 Beav. 249; *Gee* v. *Liddell* (No. 2) (1866), 35 Beav. 629; *Re Cordwell's Estate*, *White* v. *Cordwell* (1875), L. R. 20 Eq. 644; see, also, *Dingle* v. *Coppen, Coppen* v. *Dingle*, [1899] 1 Ch. 726.

legacy is, but the debt is not, immediately payable (*p*), nor where the legatee is the executor and residuary legatee of a person indebted to the testator on a statute-barred debt (*q*).

Married women.

The right cannot be asserted against a married woman, who is not legally bound to pay the debt (*r*), and where applicable the wife's equity to a settlement prevails over the right of retainer for her husband's debt (*s*).

Bankrupts.

622. Where the legatee has become bankrupt in the testator's lifetime the right cannot be exercised by the executor (*t*), except to the extent of a composition payable by the bankrupt (*a*). Where the legatee's bankruptcy is subsequent to the testator's death, the right can be exercised in full (*b*), unless the executor has chosen to prove in the bankruptcy (*c*); but the executor cannot retain against a liability of the estate as surety for the legatee, where the principal creditor has not been paid in full (*d*).

Claim under will.

Claim in intestacy.

The principle is equally applicable in the case of a debtor claiming a distributive share of the estate under an intestacy (*e*), but is not applicable to the case of a debtor who is his creditor's heir (*f*).

SUB-SECT. 5.—*The Appointment of a Debtor as Executor.*

Appointment of debtor as executor.

623. The legal effect of the appointment of a debtor as executor is to extinguish the debt (*g*); but in equity the executor is answerable for the amount of the debt as assets of the testator, not only in favour of creditors, but in favour also of all persons taking beneficially under the testator (*h*).

The debt is assets in the hands of executor from the death.

Where the debtor-executor proves the will, he must be taken as having had the amount of the debt in his hands as assets from the testator's death; he cannot accordingly set up the lapse of time between the death and the grant of probate to himself as a bar to the debt, and he is chargeable with interest from the death (*i*).

(*p*) *Re Rees, Rees* v. *Rees* (1889), 60 L. T. 260; *Re Abrahams, Abrahams* v. *Abrahams*, [1908] 2 Ch. 69.

(*q*) *Re Bruce, Lawford* v. *Bruce*, [1908] 2 Ch. 682, C. A.

(*r*) *Re Wheeler, Hankinson* v. *Hayter*, [1904] 2 Ch. 66.

(*s*) *Re Batchelor, Sloper* v. *Oliver* (1873), L. R. 16 Eq. 481, *per* Lord SELBORNE, L.C., at p. 483; *Re Briant, Poulter* v. *Shackel* (1888), 39 Ch. D. 471. As to a wife's equity to a settlement, see titles EQUITY, Vol. XIII., p. 71; HUSBAND AND WIFE.

(*t*) *Cherry* v. *Boultbee* (1839), 4 My. & Cr. 442; *Re Hodgson, Deceased, Hodgson* v. *Fox* (1878), 9 Ch. D. 673.

(*a*) *Re Orpen, Beswick* v. *Orpen* (1880), 16 Ch. D. 202.

(*b*) *Re Watson, Turner* v. *Watson*, [1896] 1 Ch. 925.

(*c*) *Stammers* v. *Elliott* (1868), 3 Ch. App. 195; *Armstrong* v. *Armstrong* (1871), L. R. 12 Eq. 614; *Re Watson, Turner* v. *Watson, supra, per* NORTH, J., at p. 933.

(*d*) *Re Binns, Lee* v. *Binns*, [1896] 2 Ch. 584.

(*e*) *Re Cordwell's Estate, White* v. *Cordwell* (1875), L. R. 20 Eq. 644.

(*f*) *Re Milnes, Milnes* v. *Sherwin* (1885), 53 L. T. 534.

(*g*) *Nedham's (Sir J.) Case* (1610), 8 Co. Rep. 135 a. The effect at law was the same though the executor died without proving the will or administering (*Wankford* v. *Wankford* (1703), 1 Salk. 299), or where the debt was a joint debt (*Cheetham* v. *Ward* (1797), 1 Bos. & P. 630; *Freakley* v. *Fox* (1829), 9 B. & C. 130). As to extinguishment of debt, generally, see title CONTRACT, Vol. VII., p. 456.

(*h*) *Carey* v. *Goodinge* (1790), 3 Bro. C. C. 110; *Berry* v. *Usher* (1805), 11 Ves. 87.

(*i*) *Ingle* v. *Richards* (No. 2) (1860), 28 Beav. 366.

SECT. 5. **Legacies.**

Claim may be rebutted.

624. Inasmuch as the debt is gone at law by the appointment of the debtor as executor, and his liability is merely equitable, the claim in equity may be rebutted by evidence of an intention on the part of the testator to forgive the debt (*k*); evidence, however, is only admissible in support of an intention to forgive the debt during the lifetime of the testator, and not in support of an intention to forgive the debt by will (*l*).

Appointment of donee of incomplete gift.

625. Upon a similar principle the appointment as an executor of a person to whom the testator has during his lifetime attempted to make a gift, which being incomplete fails on technical considerations, is sufficient to perfect the gift (*m*); but the principle is not to be extended to a case where the testator has merely announced an intention of making a gift at some future time (*n*).

SUB-SECT. 6.—*To an Executor.*

Legacy to executor.

626. The presumption is that a legacy to a person appointed executor is given to him in that character and is attached to the office, and it is incumbent on him to show something in the nature of the legacy, or other circumstances arising on the will, to rebut that presumption (*o*). Where in the gift the testator has designated the executor-legatee as a friend (*p*) or as a relation (*q*), or where the legacy is expressed to be given as a mark of respect (*r*) or as a remembrance (*s*), the presumption is rebutted. So, too, where the legacy is one of residue (*t*), or is given to the executor after the death of the tenant for life under the will (*a*). But a difference either in the nature or amounts of the legacies given to executors is not as a general rule of itself sufficient to show that the gift is not attached to the office (*b*).

(*k*) *Strong* v. *Bird* (1874), L. R. 18 Eq. 315; *Re Applebee, Leveson* v. *Beales*, [1891] 3 Ch. 422; see, also, *Re Hyslop, Hyslop* v. *Chamberlain*, [1894] 3 Ch. 522, where the evidence of forgiveness was held inadmissible.

(*l*) *Selwin* v. *Brown* (1735), 3 Bro. Parl. Cas. 607, as explained by STIRLING, J., in *Re Applebee, Leveson* v. *Beales, supra.*

(*m*) *Re Stewart, Stewart* v. *McLaughlin*, [1908] 2 Ch. 251.

(*n*) *Vavasseur* v. *Vavasseur* (1909), 25 T. L. R. 250; *Re Innes, Innes* v. *Innes*, [1910] 1 Ch. 188. As to incomplete gifts, see title GIFTS.

(*o*) *Re Appleton, Barber* v. *Tebbit* (1885), 29 Ch. D. 893, C. A., *per* COTTON, L.J., at p. 895, citing the rule as laid down in Williams on Executors. The Lord Justice added that he thought parol evidence was admissible to rebut the presumption, but FRY, L.J., at p. 898, expressly abstained from concurring in that view. In the cases of *Piggott* v. *Green* (1833), 6 Sim. 72, and *Calvert* v. *Sebbon* (1841), 4 Beav. 222, the legacy was held to be annexed to the office. In *Wildes* v. *Davies* (1853), 1 Sm. & G. 475; *Brand* v. *Chaddock* (1871), 24 L. T. 347; and *Re Bunbury's Trusts* (1876), 10 I. R. Eq. 408, the legacy was held to be not so attached. A request that a handsome gratuity should be given to the executor is void for uncertainty (*Jubber* v. *Jubber* (1839), 9 Sim. 503).

(*p*) *Re Denby* (1861), 3 De G. F. & J. 350, C. A.

(*q*) *Compton* v. *Bloxham* (1845), 2 Coll. 201, 203; *Dix* v. *Reed* (1823), 1 Sim. & St. 237.

(*r*) *Burgess* v. *Burgess* (1844), 1 Coll. 367.

(*s*) *Bubb* v. *Yelverton* (1871), L. R. 13 Eq. 131.

(*t*) *Re Maxwell, Eivers* v. *Curry*, [1906] 1 I. R. 386, C. A., following *Griffiths* v. *Pruen* (1840), 11 Sim. 202.

(*a*) *Re Reeve's Trusts* (1877), 4 Ch. D. 841.

(*b*) *Re Appleton, Barber* v. *Tebbit, supra, per* COTTON, L.J., at p. 896, commenting upon *Jewis* v. *Lawrence* (1869), L. R. 8 Eq. 345.

When executor entitled to legacy.

627. Where the legacy is attached to the office, an executor who does not act is not entitled to the benefit (*c*), even though he be prevented from acting by age or infirmity (*d*). It is not, however, absolutely necessary to prove the will; it is sufficient if the executor has in fact done something showing an intention to act as executor (*e*). An annuity given to an executor for his trouble does not cease by reason of the institution of administration proceedings (*f*).

Legacy liable to duty and to abatement.

A legacy to an executor, though attached to the office, stands upon the same footing as ordinary legacies; it is subject to legacy duty (*g*) and is liable to abatement (*h*).

Lien on defaulting executor's interest.

628. Where an executor, who is also a beneficiary, is in default to his testator's estate, the estate is entitled to a lien upon his beneficial interest (*i*). This lien is good not only against the executor himself, but against his assignee (*k*), even though the wasting of the assets took place subsequently to the assignment (*l*); and it applies not only to the beneficial interest taken by the executor directly under the will, but to any interest to which he may have become entitled derivatively, *e.g.*, as being one of the next of kin of a *cestui que trust* who has died intestate (*m*). But an unpaid beneficiary has no lien upon a specific legacy given to an executor (*n*), and the lien will be discharged by the acceptance of a composition in the bankruptcy of the defaulting executor (*o*).

SUB-SECT. 7.—*To an Infant.*

Legacy to infant.

629. An executor cannot, in the absence of an express direction in the will, safely pay a legacy to an infant until he attains full age (*p*); nor can he make the payment to the infant's father (*q*). But if the infant, after attaining his majority, ratify the payment made to his father, he cannot afterwards sue the executor (*r*).

(*c*) *Abbot* v. *Massie* (1796), 3 Ves. 148; *Slaney* v. *Watney* (1866), L. R. 2 Eq. 418.

(*d*) *Hanbury* v. *Spooner* (1843), 5 Beav. 630; *Re Hawkin's Trusts* (1864), 33 Beav. 570.

(*e*) *Harrison* v. *Rowley* (1798), 4 Ves. 212; *Lewis* v. *Mathews* (1869), L. R. 8 Eq. 277; conversely, an executor who proves without any intention of acting may be disallowed the legacy (*Harford* v. *Browning* (1787), 1 Cox, Eq. Cas. 302).

(*f*) *Baker* v. *Martin* (1836), 8 Sim. 25.

(*g*) *Re Thorley* (*J.*), *Thorley* v. *Massam*, *Re Thorley* (*W. R.*), *Thorley* v. *Massam*, [1891] 2 Ch. 613, C. A.

(*h*) *Fretwell* v. *Stacy* (1702), 2 Vern. 434; *Duncan* v. *Watts* (1852), 16 Beav. 204; *Debney* v. *Eckett* (1858), 4 Jur. (N. S.) 805; for abatement, see p. 275, *post*.

(*i*) *Barnett* v. *Sheffield* (1852), 1 De G. M. & G. 371, C. A.; *Cole* v. *Muddle* (1852), 10 Hare, 186; *Re Carew*, *Carew* v. *Carew*, [1896] 1 Ch. 527; affirmed, [1896] 2 Ch. 311, C. A. As to lien generally, see title LIEN.

(*k*) *Irby* v. *Irby* (No. 3) (1857), 25 Beav. 632.

(*l*) *Morris* v. *Livie* (1842), 1 Y. & C. Ch. Cas. 380.

(*m*) *Jacubs* v. *Rylance* (1874), L. R. 17 Eq. 341; *Doering* v. *Doering* (1889), 42 Ch. D. 203.

(*n*) *Geary* v. *Beaumont* (1817), 3 Mer. 431.

(*o*) *Re Sewell*, *White* v. *Sewell*, [1909] 1 Ch. 806.

(*p*) Toller, Law of Executors, p. 314.

(*q*) *Dagley* v. *Tolferry* (1715), 1 P. Wms. 285; *Rotheram* v. *Fanshaw* (1748), 3 Atk. 628.

(*r*) *Cooper* v. *Thornton* (1790), 3 Bro. C. C. 96.

SECT. 5. **Legacies.**

Infant domiciled abroad.

A legacy may be paid to an infant domiciled abroad on his attaining full age by the *lex loci*, though not of age by English law (*s*). The court will not, however, pay a legacy to the father of an infant domiciled abroad as of right, and without evidence as to the application for the benefit of the infant, even if by the *lex loci* the father is entitled to receive the money as legal guardian (*t*).

Duty of executor in case of legacy to infant.

630. The executor may, if desirous of distributing the residue, set aside and invest in proper securities an ample sum to answer an infant's legacy; and if the investment eventually proves insufficient when the infant attains his majority, the executor will not be held personally liable for the loss (*a*). The infant legatee will not, however, have to bear the loss himself: he will be entitled to call upon the residuary legatee to make good the deficiency. The executor has also a statutory power to pay an infant's legacy into court (*b*).

Maintenance out of income of legacy.

631. According to the practice of the Chancery Division, an infant who is entitled under the will of his parent, or of a person who stood to him *in loco parentis*, to a legacy contingently on his attaining twenty-one, is entitled to maintenance during his minority out of the income of the legacy. The legacy in such a case is said to carry interest from the testator's death, but this expression must not be taken to signify that the infant acquires a vested interest in the income, and if he dies under twenty-one the surplus income not applied for maintenance does not pass to his representatives (*c*). The rule giving interest to the child does not take effect when the testator has provided another fund for his maintenance, so that the income of the legacy is supposed not to be required for the purpose (*d*). But the statutory power of maintenance (*e*) out of a share of residue given to an infant contingently upon attaining twenty-one does not disentitle him to maintenance out of the income of a pecuniary legacy given upon the same contingency (*f*).

Infant has no vested interest in income.

(*s*) *Re Hellmann's Will* (1886), L. R. 2 Eq. 363.

(*t*) *Re Chatard's Settlement*, [1899] 1 Ch. 712, explaining *Re Crichton's Trust* (1855), 24 L. T. (o. s.) 267; *Re Ferguson's Trusts* (1874), 22 W. R. 762; *Re Brown's Trust* (1865), 12 L. T. 488.

(*a*) *Re Hall, Foster* v. *Metcalfe*, [1903] 2 Ch. 226, 233, C. A.; *Re Salaman, De Pass* v. *Sonnenthal*, [1907], 2 Ch. 46; reversed on another point, [1908] 1 Ch. 4. In *Rimell* v. *Simpson* (1848), 18 L. J. (CH.) 55, executors who had invested an infant's legacy in trust securities, which subsequently depreciated, were held liable to make good the deficiency; but the record of that case shows that the bare amount of the legacy had been invested, one of the executors was himself the residuary legatee, and both executors admitted assets for the payment of the legacy; and though the order for the payment of the legacy went against both the executors, the order for payment of the costs of the proceedings went solely against the executor who was also residuary legatee.

(*b*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 42.

(*c*) *Re Bowlby, Bowlby* v. *Bowlby*, [1904] 2 Ch. 685, C. A., where the whole law on this subject is discussed. The allowance of income on a contingent legacy is an exception to the general rule, as to which, see p. 274, *post*, and, according to a recent case, is to be strictly confined to the contingency of attaining full age or previous marriage (*Re Abrahams, Abrahams* v. *Benson*, [1910] W. N. 237).

(*d*) *Re George* (*an Infant*) (1877), 5 Ch. D. 837, C. A., *per* JAMES, L.J., at p. 843; *Re Rouse's Estate* (1852), 9 Hare, 649.

(*e*) For statutory powers, see titles INFANTS AND CHILDREN; SETTLEMENTS.

(*f*) *Re Moody, Woodroffe* v. *Moody*, [1895] 1 Ch. 101.

In the case of an infant not being either the child of the testator, or one to whom the testator stood *in loco parentis*, a legacy given contingently upon his attaining twenty-one stands upon the same footing as an ordinary contingent legacy; it does not carry the intermediate income, unless there is a direction in the will that it should be set apart (*g*).

Legacy to infant not the child of testator.

Where the income of a legacy is given for the maintenance of an infant, the legacy carries interest from the testator's death, even in the case of an infant not a child of the testator (*h*). But where the income is given to an adult person to enable him to maintain himself and his children (*i*), or subject to an obligation of maintaining infants (*k*), the legacy does not carry interest from the death.

Legacy given for maintenance carries interest from death of testator.

Both executors (*l*) and administrators (*m*) who hold property belonging to an infant are trustees for the purpose of exercising the statutory powers of trustees relating to maintenance of infants (*n*).

SUB-SECT. 8.—*Interest and Accretions on Legacies.*

632. Where no special time is fixed for the payment of a legacy, it carries interest from the expiration of one year after the testator's death, although expressly made payable out of a particular fund which does not fall in until after a longer period (*o*).

When no time fixed for payment.

An immediate general legacy carries interest only from the expiration of a year after the testator's death (*p*), even though it be directed to be paid as soon as possible (*q*). Where the testator was the parent of, or stood *in loco parentis* to, an infant legatee, the legacy carries interest from the date of his death (*r*). This favour is not extended to an adult child (*s*), nor to the testator's wife (*t*). A legacy given to an infant as executor does not carry interest until he attains twenty-one and agrees to act (*u*).

Immediate general legacies.

To infant executor.

(*g*) See p. 274, *post;* and *Re Dickson, Hill* v. *Grant* (1885), 29 Ch. D. 331, C. A. If a share of residue is given absolutely to an infant contingently on his attaining twenty-one, the infant will be entitled to both capital and arrears of income on attaining twenty-one; see *Re Bowlby, Bowlby* v. *Bowlby*, [1904] 2 Ch. 685, C. A., *per* COZENS-HARDY, L.J., at p. 711.

(*h*) *Pett* v. *Fellows* (1733), 1 Swan. 561, n.; *Leslie* v. *Leslie* (1835), L. & G. *temp.* Sugd. 1; *Re Richards* (1869), L. R. 8 Eq. 119; *Re Churchill, Hiscock* v. *Lodder*, [1909] 2 Ch. 431.

(*i*) *Raven* v. *Waite* (1818), 1 Swan. 553, 559.

(*k*) *Re Crane, Adams* v. *Crane*, [1908] 1 Ch. 379.

(*l*) *Re Smith, Henderson-Roe* v. *Hitchins* (1889), 42 Ch. D. 302.

(*m*) *Re Adams, Verrier* v. *Haskins*, [1906] W. N. 220.

(*n*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 43 (1), (2), (3). And see titles INFANTS AND CHILDREN; SETTLEMENTS.

(*o*) *Lord* v. *Lord* (1867), 2 Ch. App. 782, 789, *per* Lord CAIRNS, L.J.; *Re Whiteley, Whiteley* v. *London (Bishop)* (1909), 25 T. L. R. 543; *Re Yates, Throckmorton* v. *Pike* (1907), 96 L. T. 758, C. A.

(*p*) *Wood* v. *Penoyre* (1807), 13 Ves. 325, 333, 334.

(*q*) *Webster* v. *Hale* (1803), 8 Ves. 410, 413; *Benson* v. *Maude* (1821), Madd. & G. 15.

(*r*) *Wilson* v. *Maddison* (1843), 2 Y. & C. Ch. Cas. 372.

(*s*) *Raven* v. *Waite* (1818), 1 Swan. 553; *Wall* v. *Wall* (1847), 15 Sim. 513.

(*t*) *Stent* v. *Robinson* (1806), 12 Ves. 461, dissenting from *dictum* of ARDEN, M.R. (afterwards Lord ALVANLEY), in *Crickett* v. *Dolby* (1795), 3 Ves. 10, at p. 17; *Re Whittaker, Whittaker* v. *Whittaker* (1882), 21 Ch. D. 657.

(*u*) *Re Gardner, Long* v. *Gardner* (1892), 41 W. R. 203.

SECT. 5. **Legacies.**

In satisfaction of debt.

A legacy amounting to a satisfaction of a debt carries interest from the date of death (*v*), but a legacy in lieu of dower or freebench carries interest only from the expiration of the year (*w*).

Legacies charged on lands.

633. In the case of legacies charged upon land, where no time is fixed for payment, interest runs from the death (*x*), but not until the end of the year, where the legacy is made payable out of the proceeds of sale of real estate (*y*).

Legacies payable at a future date.

Legacies payable at a future date carry interest from that date (*z*) and not before (*a*). Where they are made payable within a particular period they carry interest from the end of the year, if the discretion to postpone payment is merely for the convenience of the estate, and there are sufficient assets within the period to pay them (*b*); but not until the expiration of the period, if the discretion to postpone is given for the personal benefit of the residuary legatee (*c*).

Defeasible legacies.

The interest on a vested legacy liable to be divested on the happening or not happening of a particular event belongs to the legatee until the happening of the defeasance (*d*).

Contingent legacies.

634. A contingent legacy does not, as a general rule, carry interest until the happening of the contingency. Where, however, the legacy is directed to be severed from the rest of the estate for the benefit of the legatee it carries intermediate income (*e*), but not where the severance is directed merely for the convenience of administering the estate (*f*).

Contingent gifts of residue.

A contingent gift of residuary personalty, or of a blended fund of real and personal estate, carries the intermediate income (*g*): a contingent gift of residuary realty does not (*h*).

Arrears of annuities.

635. Arrears of annuities do not carry interest (*i*), even though the annuity be intended as a provision for a wife or child (*j*), or though it be charged on corpus as well as on income (*k*).

(*v*) *Clark* v. *Sewell* (1744), 3 Atk. 96, 99. As to satisfaction generally, see title EQUITY, Vol. XIII., p. 128.

(*w*) *Re Bignold, Bignold* v. *Bignold* (1890), 45 Ch. D. 496. For dower and freebench, see title REAL PROPERTY AND CHATTELS REAL.

(*x*) *Pearson* v. *Pearson* (1802), 1 Sch. & Lef. 10; *Shirt* v. *Westby* (1808), 16 Ves. 393; see, too, *Re Waters, Waters* v. *Boxer* (1889), 42 Ch. D. 517.

(*y*) *Turner* v. *Buck* (1874), L. R. 18 Eq. 301.

(*z*) *Re Gyles, Gibbon* v. *Chaytor*, [1907] 1 I. R. 65; *Re White, White* v. *Shenton* (1909), 101 L. T. 780.

(*a*) *Donovan* v. *Needham* (1846), 9 Beav. 164.

(*b*) *Thomas* v. *A.-G.* (1837), 2 Y. & C. (EX.) 525.

(*c*) *Varley* v. *Winn* (1856), 2 K. & J. 700; *Olive* v. *Westerman* (1884), 53 L. J. (CH.) 525.

(*d*) *Re Buckley's Trusts* (1883), 22 Ch. D. 583.

(*e*) *Dundas* v. *Wolfe Murray* (1863), 1 Hem. & M. 425; *Kidman* v. *Kidman* (1871), 40 L. J. (CH.) 359; *Re Medlock, Ruffle* v. *Medlock* (1886), 55 L. J. (CH.) 738; *Re Inman, Inman* v. *Rolls*, [1893] 3 Ch. 518; *Re Clements, Clements* v. *Pearsall*, [1894] 1 Ch. 665; *Re Woodin, Woodin* v. *Glass*, [1895] 2 Ch. 309, C. A.

(*f*) *Re Judkin's Trusts* (1884), 25 Ch. D. 743.

(*g*) *Genery* v. *Fitzgerald* (1822), Jac. 468; *Re Dumble, Williams* v. *Murrell* (1883), 23 Ch. D. 360; *Re Burton's Will, Banks* v. *Heaven*, [1892] 2 Ch. 38; *Re Taylor, Smart* v. *Taylor*, [1901] 2 Ch. 134.

(*h*) *Hodgson* v. *Bective (Earl)* (1863), 1 Hem. & M. 376.

(*i*) *Re Hiscoe, Hiscoe* v. *Waite* (1902), 71 L. J. (CH.) 347.

(*j*) *Torre* v. *Browne* (1855), 5 H. L. Cas. 555, at p. 577.

(*k*) *Wheatly* v. *Davies* (1876), 35 L. T. 306. See also title RENTCHARGES AND ANNUITIES.

Accretions.

An immediate specific legacy carries with it all accretions from the date of death (*l*). A contingent specific legacy does not carry with it the intermediate income (*m*) unless it has been directed to be set apart (*n*).

Dividends. Rents.

The dividends on a specific legacy (*o*) and the rents on a specific devise (*p*) must be apportioned, as between the estate of the testator and the legatee, up to the death of the testator in the absence of a direction to the contrary.

Arrears of interest recoverable.

636. Only six years' arrears of interest can be recovered in respect of a legacy (*q*), but legatees who wait for the payment of their legacies until after the falling in of a reversionary interest are entitled to interest from the expiration of one year after the testator's death (*r*). The six years' limitation applies as against land to arrears of interest on legacies charged upon or payable out of any land or rent, and secured by an express trust (*s*).

Rate of interest.

The rate of interest on legacies is 4 per cent. (*t*); interest is not allowed at a higher rate, even though the residuary estate has been producing interest at a higher rate (*u*).

SUB-SECT. 9.—*Abatement.*

General legacies.

637. If the estate is insufficient to pay all the legacies in full, the general legacies must, in the absence of a contrary direction by the testator (*v*), abate in equal proportions (*w*). The onus of proving that his legacy was intended by the testator to be paid in priority lies on the party seeking priority, and the proof must be clear and conclusive (*a*) on the language of the will. Near relationship to the testator does not of itself give a legatee priority over other legatees (*b*). A mere direction to pay a legacy immediately, or within one month, or within three months after a testator's decease, is no evidence of any intention on the part of the testator to give priority to that particular legacy in case of a deficiency

(*l*) *Sleech* v. *Thorington* (1754), 2 Ves. Sen. 560, 563; *Re Jeffery's Trusts* (1866), L. R. 2 Eq. 68; *Re Marten, Shaw* v. *Marten*, [1901] 1 Ch. 370.

(*m*) *Guthrie* v. *Walrond* (1883), 22 Ch. D. 573.

(*n*) *Re Woodin, Woodin* v. *Glass*, [1895] 2 Ch. 309, C. A.

(*o*) *Pollock* v. *Pollock* (1874), L. R. 18 Eq. 329; Apportionment Act, 1870 (33 & 34 Vict. c. 35). As to apportionment, see also titles REAL PROPERTY AND CHATTELS REAL; RENTCHARGES AND ANNUITIES; SETTLEMENTS.

(*p*) *Hasluck* v. *Pedley* (1874), L. R. 19 Eq. 271; *Constable* v. *Constable* (1879), 11 Ch. D. 681.

(*q*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 42. For limitation as to time generally, see title LIMITATION OF ACTIONS.

(*r*) *Re Blachford, Blachford* v. *Worsley* (1884), 27 Ch. D. 676.

(*s*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 10.

(*t*) See R. S. C., Ord. 55, r. 64.

(*u*) *Re Campbell, Campbell* v. *Campbell*, [1893] 3 Ch. 468; *Sitwell* v. *Bernard* (1801), 6 Ves. 520.

(*v*) *Marsh* v. *Evans* (1720), 1 P. Wms. 668; *Lewin* v. *Lewin* (1752), 2 Ves. Sen. 415.

(*w*) 2 Bl. Com., 10th ed., 512.

(*a*) *Miller* v. *Huddlestone* (1851), 3 Mac. & G. 513, *per* Lord TRURO, L.C., at p. 523.

(*b*) *Re Schweder's Estate, Oppenheim* v. *Schweder*, [1891] 3 Ch. 44.

SECT. 5. **Legacies.**

in the estate (*c*). A legacy given to a testator's widow to be paid immediately after his death for her immediate wants is liable to abatement with the other legacies (*d*). Nor is a legacy to an executor entitled to any priority (*e*). Where a legacy is given free from duty, the legacy duty must be treated as an additional legacy and be added to the legacy for the purpose of abatement (*f*).

Legacy in satisfaction of a debt.

There appears to be some doubt whether a legacy given in satisfaction of a debt abates with legacies given to volunteers. In a case where the debt was an ascertained debt, and the legatee had elected to take under the will a legacy far in excess of his debt, it was held that his legacy must abate rateably with the other pecuniary legacies (*g*); but there are statements to be found that legacies to creditors are not liable to abatement with legacies to volunteers (*h*). A creditor with whom the testator has compounded cannot be treated as a purchaser of his legacy (*i*).

Legacy in lieu of dower.

638. Where a legacy is bequeathed to the widow in satisfaction of her right to dower she is regarded as a purchaser of the legacy, and if she elect to take it in lieu of dower the legacy has priority over other legacies (*k*), notwithstanding that it may greatly exceed the amount of the dower (*l*). But the widow is not entitled to priority where the testator leaves no real estate to which the right to dower could attach (*m*), nor where he has barred her right to dower by any mode in which dower can be barred, including a disposition of his real estate by will (*n*).

Annuities to be valued and abate.

639. Where annuities are given by will, and the estate is deficient, the annuities must be valued and abate proportionably, and the apportioned sum must be paid to the annuitant (*o*), or, in the case of a married woman restrained from anticipating the annuity, laid out in the purchase of an annuity (*p*). In the event

(*c*) *Re Schweder's Estate, Oppenheim* v. *Schweder*, [1891] 3 Ch. 44, *per* CHITTY, J., at p. 45, following *Blower* v. *Morret* (1752), 2 Ves. Sen. 420, and dissenting from *Re Hardy, Wells* v. *Borwick* (1881), 17 Ch. D. 798; see, too, *Brown* v. *Allen* (1682), 1 Vern. 31; *Beeston* v. *Booth* (1819), 4 Madd. 161.

(*d*) *Cazenove* v. *Cazenove* (1889), 61 L. T. 115.

(*e*) *Duncan* v. *Watts* (1852), 16 Beav. 204.

(*f*) *Re Turnbull, Skipper* v. *Wade*, [1905] 1 Ch. 726.

(*g*) *Re Wedmore, Wedmore* v. *Wedmore*, [1907] 2 Ch. 277.

(*h*) See *Davies* v. *Bush* (1831), You. 341, *per* Lord LYNDHURST, L.C.B., at p. 343; *Re Lawley, Zaiser* v. *Lawley*, [1902] 2 Ch. 799, C. A., *per* COZENS-HARDY, L.J., at p. 807.

(*i*) *Coppin* v. *Coppin* (1725), 2 P. Wms. 291, 296.

(*k*) *Burridge* v. *Bradyl* (1710), 1 P. Wms. 127; *Blower* v. *Morret* (1752), 2 Ves. Sen. 420; *Davenhill* v. *Fletcher* (1754), Amb. 244; *Heath* v. *Dendy* (1826), 1 Russ. 543.

(*l*) *Roper* v. *Roper* (1876), 3 Ch. D. 714, *per* MALINS, V.-C., at p. 716.

(*m*) *Roper* v. *Roper, supra.*

(*n*) *Re Greenwood, Greenwood* v. *Greenwood*, [1892] 2 Ch. 295, disapproving of *dictum* of MALINS, V.-C., in *Roper* v. *Roper, supra*, at p. 719. For methods of barring dower, see Dower Act, 1833 (3 & 4 Will. 4, c. 105), ss. 4—9, and titles HUSBAND AND WIFE; REAL PROPERTY AND CHATTELS REAL.

(*o*) *Long* v. *Hughes* (1831), 1 De G. & Sm. 364, n.; *Wright* v. *Callender* (1852), 2 De G. M. & G. 652; *Wroughton* v. *Colquhoun* (1847), 1 De G. & Sm. 357; *Innes* v. *Mitchell* (1846), 1 Ph. 710; *Re Cottrell, Buckland* v. *Bedingfield*, [1910] 1 Ch. 402.

(*p*) See *Re Ross, Ashton* v. *Ross*, [1900] 1 Ch. 162.

of the death of the annuitant after the sum is ascertained, but before payment, the sum must be paid to his personal representatives (*q*).

Defeasible annuities.

Where the annuity is defeasible upon the happening of an event in the lifetime of the annuitant, there is a conflict of opinion whether the capital value of the annuity ought to be paid to the annuitant (*r*): it should not, it is submitted, be paid to him, if there is a gift over of the annuity upon the happening of the event.

Method of valuing annuities.

For the purpose of estimating the values of annuities, it is not unreasonable that the facts should be taken so far as they are of assistance, and the contingency calculated at the last moment (*s*). Accordingly, if all the annuitants are living at the period of the division, the values must be ascertained as at the death of the testator; if all be dead, the values must be taken to be the respective amounts of arrears; if some be dead and others living, the value as to the former will be taken at the amount of their arrears, and as to the latter, at the amount of their arrears added to the calculated value of the future payments (*t*). Annuitants in possession are not bound, as between themselves and reversionary annuitants, to bring past payments into hotchpot (*a*).

Demonstrative legacies.

640. Demonstrative legacies do not abate with general legacies, except so far as the fund provided is insufficient for their payment (*b*).

Specific legacies.

641. Specific legacies do not abate with general legacies, but where the general estate is insufficient to pay all the debts, they must abate rateably *inter se* (*c*). The rule applies to a gift of a specific fund in aliquot proportions (*d*), but where fixed sums are given out of a particular fund, and the balance is disposed of as residue, and not as an aliquot proportion, the residue must be first exhausted (*e*).

The forgiveness of a debt by will amounts to a specific legacy of the debt (*f*).

(*q*) *Re Ross, Ashton* v. *Ross*, [1900] 1 Ch. 162.

(*r*) In *Carr* v. *Ingleby* (1831), 1 De G. & Sm. 362, the ascertained amount was directed to be laid out in the purchase of an annuity for the life of the annuitant, and the annuity was directed to be paid to her until the happening of the event; see, too, *Gratrix* v. *Chambers* (1860), 2 Giff. 321. In *Re Sinclair, Allen* v. *Sinclair, Hodgkin* v. *Sinclair*, [1897] 1 Ch. 921, KEKEWICH, J., refused to follow *Carr* v. *Ingleby, supra*, and directed the fund to be paid to the annuitant, but it is to be observed that the title to the annuity in *Re Sinclair, Allen* v. *Sinclair, Hodgkin* v. *Sinclair*, did not rest upon the will, but upon a covenant entered into by the deceased in his lifetime; *Re Cottrell, Buckland* v. *Bedingfield*, [1910] 1 Ch. 402. See also title RENTCHARGES AND ANNUITIES.

(*s*) See *Potts* v. *Smith* (1869), L. R. 8 Eq. 683, *per* JAMES, V.-C., at p. 686.

(*t*) *Todd* v. *Bielby* (1859), 27 Beav. 353.

(*a*) *Re Metcalf, Metcalf* v. *Blencowe*, [1903] 2 Ch. 424. The direction to the contrary appearing in the order in *Potts* v. *Smith, supra*, is inconsistent with the judgment in that case; *Re Metcalf, Metcalf* v. *Blencowe, supra, per* FARWELL, J., at p. 428.

(*b*) *Roberts* v. *Pocock* (1798), 4 Ves. 150; *Mann* v. *Copland* (1817), 2 Madd. 223; *Fowler* v. *Willoughby* (1825), 2 Sim. & St. 354.

(*c*) *Brown* v. *Allen* (1682), 1 Vern. 31; *Devon* (*Duke*) v. *Atkins* (1726), 2 P. Wms. 381.

(*d*) *Page* v. *Leapingwell* (1812), 18 Ves. 463.

(*e*) *Petre* v. *Petre* (1851), 14 Beav. 197; see, too, *De Lisle* v. *Hodges* (1874), L. R. 17 Eq. 440; *Re Tunno, Raikes* v. *Raikes* (1890), 45 Ch. D. 66.

(*f*) *Re Wedmore, Wedmore* v. *Wedmore*, [1907] 2 Ch. 277.

Legacies.

Between executor and legatee.

642. An executor who has voluntarily paid a legacy cannot call upon the legatee to refund (*g*), though he is entitled to do so in the case of a deficiency of assets where he has made the payment under compulsion of an action (*h*). Nor is an executor-trustee who has severed a portion of the estate in favour of a particular legatee entitled to have recourse to the severed portion to indemnify himself against a liability which he has been called upon to discharge in respect of another portion of the estate (*i*).

Where executor has parted with residuary estate.

Where the executor with notice of a debt has parted with the residue to the residuary legatee he cannot call upon the latter to refund (*k*); but where he has parted with the residue without knowledge of anything that interferes with the right of the residuary legatee to receive it, and debts are subsequently discovered which he is obliged to pay, he can call on the residuary legatee to refund (*l*). Notice at the time of distribution of a mere liability which does not constitute a debt does not prevent him from subsequently calling upon the residuary legatee (*m*). He can, however, only recover the capital paid to the legatee without interest (*n*).

Right to equalise out of future payments.

643. An executor-trustee who has overpaid one beneficiary is entitled in the future administration of the trusts to equalize the payments at the expense of the overpaid beneficiary (*o*); but he cannot claim such an adjustment in his own favour where he is the person responsible for the mistake which has been made (*p*).

As between legatees.

644. Where the executor is solvent, a legatee who has been voluntarily paid cannot be called upon to refund at the instance of an unpaid legatee (*q*). Where the executor becomes insolvent, it would appear that the legatee cannot be compelled to refund, if the estate was sufficient in the first instance to satisfy all the legacies (*r*). A residuary legatee who institutes administration proceedings can be compelled in those proceedings to refund, for the purpose of paying legacies, money paid to him by the executor before action (*s*).

As between residuary legatees.

Where one of several residuary legatees has received his share of the estate, the others cannot call upon him to refund if the estate is subsequently wasted: but they can do so if the wasting has

(*g*) *Orr* v. *Kaines* (1751), 2 Ves. Sen. 194; *Hilliard* v. *Fulford* (1876), 4 Ch. D. 389; see also *Hodges* v. *Waddington* (1679), 2 Cas. in Ch. 9.
(*h*) *Newman* v. *Barton* (1691), 2 Vern. 205.
(*i*) *Fraser* v. *Murdoch* (1881), 6 App. Cas. 855.
(*k*) *Jervis* v. *Wolferstan* (1874), L. R. 18 Eq. 18, *per* JESSEL, M.R., at p. 25.
(*l*) *Whittaker* v. *Kershaw* (1890), 45 Ch. D. 320, C. A., *per* COTTON, L.J., at p. 325.
(*m*) *Jervis* v. *Wolferstan, supra*; *Whittaker* v. *Kershaw, supra.*
(*n*) *Jervis* v. *Wolferstan, supra.*
(*o*) *Livesey* v. *Livesey* (1827), 3 Russ. 287; *Dibbs* v. *Goren* (1849), 11 Beav. 483.
(*p*) *Re Horne, Wilson* v. *Cox Sinclair*, [1905] 1 Ch. 76.
(*q*) *Orr* v. *Kaines, supra.*
(*r*) *Anon.* (1718), 1 P. Wms. 495; *Walcott* v. *Hall* (1788), 2 Bro. C. C. 305; *Fenwick* v. *Clarke* (1862), 4 De G. F. & J. 240, C. A.
(*s*) *Prowse* v. *Spurgin* (1868), L. R. 5 Eq. 99.

taken place before the share was received (*t*). It lies upon the person requiring the money to be refunded to show that the payment was made in excess (*a*).

Mistake as to persons entitled.

645. Where an intestate's estate has been distributed under an order of the court amongst the persons found to be next of kin, and another person subsequently establishes his title to be next of kin, he can compel the persons amongst whom the estate has been distributed to refund what has been paid to them in excess of their shares (*b*).

Between creditor and legatees.

646. A creditor has no legal right to recover payment of his debt against a legatee: but the court, in order to do justice and to avoid the evil of allowing one man to retain what is really and legally applicable to the payment of another man, has devised a remedy by which, where the estate has been distributed either out of court or in court without regard to the rights of a creditor, it has allowed the creditor to recover back what has been paid to the beneficiaries or to the next of kin (*c*). The right of the creditor being, however, purely equitable, may be met by any answer which affords a good equitable defence (*d*), such as laches, acquiescence, or other conduct which would render it unjust for the court to allow him to assert any right against the legatee (*e*).

Right an equitable one.

Right of creditor against general fund in court.

647. Where the estate is being administered by the court the creditor can at any time, upon such terms as the court may think fit to impose, come in and claim against a fund in court, standing to the general credit of an administration action (*f*).

Against fund carried to a separate account.

As against a fund which has been carried to a separate account in an administration action, the creditor whose claim has not been previously established has not a right to have the whole of the debt paid out of the fund, but only such proportion thereof as the fund bears to the whole of the assets distributed by the court (*g*).

When estate administered out of court.

648. Where the estate has been administered out of court the creditor is entitled to proceed against a legatee for the whole of his debt, and not merely for a proportionate part (*h*), notwithstanding that the legatee has received payment of his legacy in entire

(*t*) *Peterson* v. *Peterson* (1866), L. R. 3 Eq. 111; *Re Winslow, Frevre* v. *Winslow* (1890), 45 Ch. D. 249.

(*a*) *Peterson* v. *Peterson*, *supra*, at p. 114.

(*b*) *David* v. *Frowd* (1833), 1 My. & K. 200; *Sawyer* v. *Birchmore* (1837), 2 My. & Cr. 611.

(*c*) *Harrison* v. *Kirk*, [1904] A. C. 1, *per* Lord DAVEY, at p. 7; *Noel* v. *Robinson* (1682), 1 Vern. 90, 94; *March* v. *Russell* (1837), 3 My. & Cr. 31; *National Assurance Co.* v. *Scott*, [1909] 1 I. R. 325.

(*d*) *Ibid.*; *Blake* v. *Gale* (1886), 32 Ch. D. 571, C. A.

(*e*) *Ridgway* v. *Newstead* (1860), 2 Giff. 492, *per* STUART, V.-C., at p. 501; and as to equitable defences generally, see title EQUITY, Vol. XIII., pp. 161 *et seq.*

(*f*) *Harrison* v. *Kirk*, *supra*, affirming decision of the Irish Court of Appeal, *sub nom. Beattie* v. *Cordner*, [1903] 1 I. R. 1, C. A. The court requires a creditor to pay the costs of the application (*ibid.*, *per* Lord DAVEY, at p. 6; *Gillespie* v. *Alexander* (1827), 3 Russ. 130, *per* Lord ELDON, L.C., at p. 136).

(*g*) *Gillespie* v. *Alexander*, *supra*; *Greig* v. *Somerville* (1830), 1 Russ. & M 338.

(*h*) *Davies* v. *Nicolson* (1858), 2 De G. & J. 693, C. A.

SECT. 5. Legacies.

ignorance of the creditor's claim (*i*). He is entitled to attack any legatee he chooses; and the person attacked is entitled to contribution from his co-legatees (*k*).

Insolvent contributories.

Where the court has directed contribution amongst the beneficiaries for payment of debts and costs, and one of the beneficiaries is insolvent, it will direct an additional contribution amongst the solvent beneficiaries (*l*).

When estate of undischarged bankrupt distributed.

The trustee in bankruptcy of an undischarged intestate bankrupt whose estate has been distributed by the administrator among the next of kin can call upon the latter to refund the shares they have received (*m*).

Right to follow a legacy.

Unsatisfied creditors have a right to follow a legacy against volunteers claiming through the legatee, but they have no such right against a *bonâ fide* purchaser from the legatee (*n*). Where the executor has not parted with control over the assets, or where the legacy is represented by a fund in court, the purchaser from the legatee takes subject to the rights of unsatisfied creditors, though their claims be established after the purchase (*o*).

SECT. 6.—*The Distribution of the Residue.*

SUB-SECT. 1.—*Where Residue absolutely disposed of.*

What residuary gift comprises.

649. A general residuary gift passes everything not disposed of, whether the testator has not attempted to dispose of it, or whether the disposition fails by lapse or any other event (*p*). In order to exclude from such a gift a particular property belonging to the testator and not otherwise disposed of by will, it is necessary to find a plain and unequivocal intention on the part of the testator not to include that property in the residuary gift: the mere fact that the testator is under the erroneous impression that the particular property is not his to dispose of does not exclude the property from the residue (*q*).

(*i*) *March* v. *Russell* (1837), 3 My. & Cr. 31.

(*k*) *Davies* v. *Nicolson* (1858), 2 De G. & J. 693, C. A. The order in this case was that the specific legatee was liable to pay the creditor, without prejudice to any question between himself, the executor, and the residuary legatee. For a form of order against residuary legatees, devisees, and heir, see *Worthington & Co., Ltd.* v. *Abbott*, [1910] 1 Ch. 588, 598.

(*l*) *Conolly* v. *Farrell* (1846), 10 Beav. 142; *Re Peerless, Peerless* v. *Smith*, [1901] W. N. 151.

(*m*) *Re Bennett, Ex parte Official Receiver*, [1907] 1 K. B. 149, and see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 165.

(*n*) *Dilkes* v. *Broadmead* (1860), 2 Giff. 113; *Spackman* v. *Timbrell* (1857), 8 Sim. 253.

(*o*) *Noble* v. *Brett* (1857), 24 Beav. 499; *Hooper* v. *Smart, Piper* v. *Piper, Bailey* v. *Piper* (1875), 1 Ch. D. 90.

(*p*) See *Re Bagot, Paton* v. *Ormerod*, [1893] 3 Ch. 348, C. A., *per* LOPES, L.J., at p. 359; *Easum* v. *Appleford* (1840), 5 My. & Cr. 56, 61; *Bernard* v. *Minshull* (1859), John. 276; *Blight* v. *Hartnoll* (1883), 23 Ch. D. 218, C. A.; see, too, the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 25, as to the effect of a residuary devise.

(*q*) *Re Bagot, Paton* v. *Ormerod, supra*, at p. 359, commenting on the earlier decisions, *Circuitt* v. *Perry* (1856), 23 Beav. 275; *Harris* v. *Harris* (1869), 3 I. R. Eq. 610; *Hawks* v. *Longridge* (1873), 29 L. T. 449; and *Clibborn* v. *Clibborn* (1857), 2 Ir. Jur. (N. S.) 386.

SECT. 6. The Distribution of the Residue.

650. A general devise of the real estate or a general bequest of the personal estate of the testator is to be construed to include any real or personal estate, as the case may be, which the testator may have power to appoint in any way he may think proper, and is to operate as an execution of such power in the absence of a contrary intention (*r*).

Property subject to general power of appointment.

651. Where a gift of part of the residue fails the lapsed share does not fall into residue, but goes as undisposed of (*a*). A direction, however, that a revoked (*b*) or a lapsed share (*c*) shall fall into residue amounts to a gift of that share to the other residuary legatees.

Failure of a share of residue.

If a legacy given out of a share of residue fails, it goes to the next of kin as undisposed of (*d*). Where, however, the will contains a gift over operating upon the share of residue as a whole, the gift of the remaining part of that share carries such a legacy in the event of its failure (*e*).

Failure of legacy given out of share of residue.

652. A residuary legatee has a right to insist that, in the course of the first year after the testator's death, the executor shall, if it be possible, pay the debts, legacies, and funeral and testamentary expenses, so that the clear residue may be ascertained and paid over to him, or, if he has only a life interest in it, may be duly secured for the benefit of the persons successively entitled (*f*); but the effect of the bequest is not to vest in him any particular asset of the testator (*g*).

Right of residuary legatee to have residue ascertained.

SUB-SECT. 2.—*Where Residuary Estate settled.*

653. The tenant for life of the residuary estate is entitled to the income of that estate from the death; he is not, however, entitled to the whole of the income actually derived from the estate. He is not entitled to the income arising from what is wanted for payment of debts or legacies, because that never becomes residue in any way whatever. Accordingly, although executors are at liberty, as between themselves and the persons interested in the residue, to have recourse to any funds they please in order to pay debts and legacies,

How income of residue ascertained.

(*r*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 27. The instrument creating the power may be so framed as to exclude from the operation of this section any particular kinds of will (*Phillips* v. *Cayley* (1889), 43 Ch. D. 222, C. A., *per* BOWEN, L.J., at p. 233; *Re Davies, Davies* v. *Davies*, [1892] 3 Ch. 63). As to the effect of an appointment being limited to an extent necessary to pay debts and legacies, see *Hawthorn* v. *Shedden* (1856), 3 Sm. & G. 293; *Re Seabrook (Selina), Gray* v. *Baddeley*, [1910] W. N. 244. For the effect of the execution of powers, see title POWERS; and as to construction of wills, see title WILLS.

(*a*) *Re Wood's (Mary) Will* (1861), 29 Beav. 236; *Sykes* v. *Sykes* (1868), 3 Ch. App. 301.

(*b*) *Re Palmer, Palmer* v. *Answorth*, [1893] 3 Ch. 369, C. A., overruling *Humble* v. *Shore* (1847), 7 Hare, 247.

(*c*) *Re Allan, Dow* v. *Cassaigne*, [1903] 1 Ch. 276, C. A.

(*d*) *Lloyd* v. *Lloyd* (1841), 4 Beav. 231; applied in *Green* v. *Pertwee* (1846), 5 Hare, 249, but doubted by KAY, J., in *Re Judkin's Trusts* (1884), 25 Ch. D. 743, 750.

(*e*) *Re Parker, Stephenson* v. *Parker*, [1901] 1 Ch. 408, doubting *Skrymsher* v. *Northcote* (1818), 1 Swan. 566.

(*f*) *Wightwick* v. *Lord* (1857), 6 H. L. Cas. 217, 226.

(*g*) *Sudeley (Lord)* v. *A.-G.*, [1897] A. C. 11.

SECT. 6. The Distribution of the Residue.

yet in adjusting accounts between tenant for life and remainderman the rule is that they must be treated as having paid the debts and legacies not out of capital only, nor out of income only, but with such portion of the capital as, together with the income of that portion for one year, is sufficient for the purpose (*h*). This rule is not affected by the fact that the debts and legacies have all been paid before the expiration of the year, or that the residuary estate has produced a large income by reason of its being invested in a business (*i*).

In case of real estate charged with debt.

654. Where real estate is charged with debts, and recourse is had to such real estate, the tenant for life must, as from the testator's death, keep down the interest upon all the debts bearing interest for payment of which recourse is had to such real estate (*k*).

Adjusting liability in respect of annuities.

Where the debt consists of an annuity, either of two courses may be adopted. The successive instalments of the annuity may be borne by income and capital in proportion to the actuarial values of the life estate and reversion at the testator's death (*l*), or the sum required for the payment of each instalment may be apportioned by calculating what sum set aside at the testator's death and accumulated at compound interest would have met the particular payment, the sum so ascertained to be attributed to capital, and the accumulated interest to income (*m*). The method, which has occasionally been adopted (*n*), of throwing each successive instalment of the annuity upon corpus only, with the result that the sole contribution of the tenant for life to the payment is the consequent reduction of his future income, though obviously the more convenient course, would thus not appear to be technically correct.

Conversion of wasting etc. property.

655. Where the residuary personal estate is settled it is to be assumed, in the absence of any evidence of a contrary intention, that the testator intended that his legatees should enjoy the same thing in succession. In order, accordingly, to give effect to his intention, the rule is that such parts of the estate as are of a wasting or reversionary character, or are represented by securities of a hazardous nature, ought, as between the tenant for life and the remainderman, to be treated as having been converted and invested in permanent investments of a recognised character (*o*).

(*h*) *Allhusen* v. *Whittell* (1867), L. R. 4 Eq. 295.

(*i*) *Lambert* v. *Lambert* (1873), L. R. 16 Eq. 320.

(*k*) *Marshall* v. *Crowther* (1874), 2 Ch. D. 199.

(*l*) *Yates* v. *Yates* (1860), 28 Beav. 637; *Re Dawson, Arathoon* v. *Dawson*, [1906] 2 Ch. 211.

(*m*) *Re Perkins, Brown* v. *Perkins*, [1907] 2 Ch. 596; *Re Poyser, Landon* v. *Poyser*, [1910] 2 Ch. 444. The interest in this case was directed to be taken at 3½ per cent. See also title RENTCHARGES AND ANNUITIES.

(*n*) *Re Harrison, Townson* v. *Harrison* (1889), 43 Ch. D. 55; *Re Bacon, Grissel* v. *Leathes* (1893), 62 L. J. (CH.) 445; *Re Henry, Gordon* v. *Gordon*, [1907] 1 Ch. 30; see, too, the order made in *Re Muffett, Jones* v. *Mason* (1888), 39 Ch. D. 534; Seton, Judgments and Orders, 6th ed., p. 1633.

(*o*) *Howe* v. *Dartmouth (Earl), Howe v. Aylesbury (Countess)* (1802), 7 Ves. 137; *Pickering* v. *Pickering* (1839), 4 My. & Cr. 289; *Cafe* v. *Bent* (1845), 5 Hare, 24, 35; *Pickup* v. *Atkinson* (1846), 4 Hare, 624, 628; *Macdonald* v. *Irvine* (1878),

This rule is not to be applied in cases in which there is an indication of an intention that the property should be enjoyed *in specie;* but, although small indications of such an intention may be sufficient, the burden of showing the intention is upon those who desire to exclude the operation of the rule (*p*). The rule does not apply in the case of immovables situated in a foreign country (*q*).

Unless property to be enjoyed *in specie.*

656. The rule applies where there is a trust for conversion, even though there be a discretionary power to postpone conversion, or to retain existing securities (*r*), unless there is a gift to the tenant for life of the actual income derived from the estate pending the conversion (*s*). But even in the latter case the discretion does not go so far as to enable the executor to alter the rights of the parties, except in so far as he may do so by postponing the conversion of one portion of the estate rather than another as a matter of management (*t*).

Effect of trust for conversion.

The mere absence of a direction to convert is not sufficient to exclude the operation of the rule (*a*); but, where there is no trust for conversion, an express power to retain existing investments is sufficient to exclude the rule (*b*), and for this purpose there is no distinction between unauthorised securities of a wasting and those of a permanent nature (*c*).

Where no trust for conversion.

A discretionary power of sale, as opposed to a direction to convert, is also sufficient to exclude the application of the rule (*d*).

657. Where real estate has been settled upon trust for sale with a power to postpone conversion which has been exercised, or where the sale without any impropriety has been postponed, the rents and profits of the real estate until sale are payable to the person who would be entitled to the income of the proceeds of sale (*e*).

In case of real estate.

8 Ch. D. 101, 112, C. A.; *Re Straubenzee, Boustead* v. *Cooper*, [1901] 2 Ch. 779, 782; *Re Bates, Hodgson* v. *Bates*, [1907] 1 Ch. 22, 26.

(*p*) *Morgan* v. *Morgan* (1851), 14 Beav. 72, 82; *Macdonald* v. *Irvine* (1878), 8 Ch. D. 101, C. A., at p. 124; *Re Eaton, Danes* v. *Eaton*, [1894] W. N. 95. In *Re Hubbuck, Hart* v. *Stone*, [1896] 1 Ch. 754, C. A., and *Re Game, Game* v. *Young*, [1897] 1 Ch. 881, the language was not considered sufficiently strong to exclude the rule.

(*q*) *Re Moses, Moses* v. *Valentine*, [1908] 2 Ch. 235.

(*r*) *Re Woods, Gabelini* v. *Woods*, [1904] 2 Ch. 4; *Re Chaytor, Chaytor* v. *Horn*, [1905] 1 Ch. 233.

(*s*) *Mackie* v. *Mackie* (1845), 5 Hare, 70; *Re Thomas, Wood* v. *Thomas*, [1891] 3 Ch. 482.

(*t*) *Rowlls* v. *Bebb, Re Rowlls, Walters* v. *Treasury Solicitor*, [1900] 2 Ch. 107, C. A., *per* LINDLEY, M.R., at p. 117.

(*a*) *Morgan* v. *Morgan, supra.*

(*b*) *Gray* v. *Siggers* (1880), 15 Ch. D. 74; *Re Sheldon, Nixon* v. *Sheldon* (1888), 39 Ch. D. 50; *Re Bates, Hodgson* v. *Bates, supra; Re Wilson, Moore* v. *Wilson*, [1907] 1 Ch. 394; *Re Nicholson, Eade* v. *Nicholson*, [1909] 2 Ch. 111, disapproving *Porter* v. *Baddeley* (1877), 5 Ch. D. 542.

(*c*) *Re Nicholson, Eade* v. *Nicholson, supra*, setting at rest the doubt raised by NORTH, J., in *Re Sheldon, Nixon* v. *Sheldon, supra*, and by KEKEWICH, J., in *Re Bates, Hodgson* v. *Bates, supra*, as to whether such a distinction ought to be made.

(*d*) *Simpson* v. *Lester* (1858), 4 Jur. (N. S.) 1269; *Re Pitcairn, Brandreth* v. *Colvin*, [1896] 2 Ch. 199; *Re Bentham, Pearce* v. *Bentham* (1906), 94 L. T. 307.

(*e*) *Re Searle, Searle* v. *Baker*, [1900] 2 Ch. 829; *Re Darnley (Earl), Clifton* v. *Darnley*, [1907] 1 Ch. 159; see, too, *Hope* v. *D'Hédouville*, [1893] 2 Ch. 361.

SECT. The Distribution of the Residue.

The same rule applies where real and personal estate are together given on trust for sale, and the proceeds of both are to be held as one fund (*f*).

Adjustment in case of income-producing property.

658. Where income-producing property, which ought to have been converted by the executor, is in fact retained, the rights of the tenant for life and remainderman are adjusted upon the following basis: where there is a direction to convert, the property is valued as at the death of the testator, where there is no such direction as at the expiration of one year after his death; the tenant for life is allowed interest at the rate of 3 per cent. upon the ascertained value, and the balance of the income actually produced is capitalised. The tenant for life is entitled to the income derived from the investments of the capitalised income (*g*).

In case of reversionary property.

Where the property which ought to have been sold consists of personal estate which eventually falls in some years after the testator's death, the apportionment is made by ascertaining what sum put out at interest at 3 per cent. on the day of the testator's death, and accumulated at compound interest with a deduction for income tax, would with the accumulations of interest have produced at the day of receipt the amount actually received; the sum so ascertained is to be treated as capital, and the residue as income (*h*).

SUB-SECT. 3.—*Where Residue undisposed of.*

Undisposed-of residue, where there are next of kin.

659. In the absence of an express disposition of a testator's residuary personal estate, the executor is a trustee thereof for the statutory next of kin (*i*), unless it appears by the will that he is intended to take beneficially. The mere fact that a person is appointed executor does not give him any portion of the personal estate whatever; he must show on the construction of the will that he was intended to take beneficially (*k*); evidence outside the will is inadmissible to prove the intention (*l*). The executor is not, however, an express trustee for the next of kin; and the remedy of the latter against him is accordingly barred at the expiration of twenty years (*m*).

Where residue given to executors.

Where the testator's residuary personal estate is given to the executors, the question whether they take beneficially or not is to be decided upon the true construction of the will (*n*).

(*f*) *Re Oliver, Wilson* v. *Oliver*, [1908] 2 Ch. 74.

(*g*) *Brown* v. *Gellatly* (1867), 2 Ch. App. 751. The present rate of interest at 3 per cent. was fixed by KEKEWICH, J., in *Re Woods, Gabelini* v. *Woods*, [1904] 2 Ch. 4.

(*h*) *Re Chesterfield's (Earl) Trusts* (1883), 24 Ch. D. 643. The present rate of interest at 3 per cent. was fixed by LINDLEY, M.R., in *Rowlls* v. *Bebb*, *Re Rowlls, Walters* v. *Treasury Solicitor*, [1900] 2 Ch. 107, C. A.

(*i*) Executors Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 40), s. 1.

(*k*) *Williams* v. *Arkle* (1875), L. R. 7 H. L. 606, 630.

(*l*) *Love* v. *Gaze* (1845), 8 Beav. 472.

(*m*) *Re Lacy, Royal General Theatrical Fund Association* v. *Kydd*, [1899] 2 Ch. 149; see also *Re Gompertz, Parker* v. *Gompertz* (1910), 55 Sol. Jo. 76, and p. 285, *post*.

(*n*) *Williams* v. *Arkle* (1875), L. R. 7 H. L. 606; *Re Roby, Howlett* v. *Newington*, [1908] 1 Ch. 71, C. A.; see, also, *Balfe* v. *Halfpenny*, [1904] 1 I. R. 486.

SECT. 6. The Distribution of the Residue.

Where no statutory next of kin.

Presumption against executors taking beneficially.

660. Where there are no statutory next of kin, the appointment of executors is a gift to them of the personal estate, and they will not be deprived of the beneficial interest, unless a strong presumption arises from the will that the intention of the testator was that the executors should not take the personalty beneficially, *virtute officii*; if there is such a presumption, then the court holds the executors to be trustees for the Crown (*o*). If there is one executor and a legacy is given to him, the necessary presumption is afforded; so also, if there are several executors, and equal legacies are given to them; but if there are several executors and unequal legacies are given to them, that does not raise such a strong presumption as is required (*p*): in such a case the executors take beneficially (*q*).

Rebuttable by parol evidence.

Where a presumption arises from the will against the executors taking the residue beneficially *virtute officii*, the executors are entitled to adduce evidence outside the will to rebut that presumption (*r*).

Limitation to recovery of personalty of intestate.

661. The beneficial devolution of an intestate s estate is dealt with elsewhere (*s*); but it may here be remarked that the remedy against the legal personal representative of an intestate for the recovery of his personal estate is, in the absence of part payment or acknowledgment, barred at the expiration of twenty years by statute (*t*). This bar can be relied upon, notwithstanding that the representative has converted the estate to his own use (*a*), but the time does not begin to run in respect of any particular asset until it has come into his hands (*b*).

SECT. 7.—*Order of Application of Assets.*

SUB-SECT. 1.—*In Payment of Unsecured Debts.*

Primary fund, general personal estate.

662. The personal estate of a deceased person is the primary fund for the payment of his debts (*c*), and this is so although his real estate now vests in his personal representative by operation of law (*d*). As between personal estate specifically bequeathed and

(*o*) *Dacre* v. *Patrickson* (1860), 1 Drew. & Sm. 182, *per* KINDERSLEY, V.-C., at p. 184; see also title CONSTITUTIONAL LAW, Vol. VII., p. 210.

(*p*) *Dacre* v. *Patrickson, supra.*

(*q*) *Bowker* v. *Hunter* (1783), 1 Bro. C. C. 328; *Blinkhorn* v. *Feast* (1750), 2 Ves. Sen. 27, 30; *Re Glukman, A.-G.* v. *Jefferys*, [1908] 1 Ch. 552, C. A.; affirmed, *sub nom. A.-G.* v. *Jefferys* [1908] A. C. 411.

(*r*) *Rutland* (*Duke*) v. *Rutland* (*Duchess*) (1724), 2 P. Wms. 209; *Ulrich* v. *Litchfield* (1742), 2 Atk. 372; *Cloyne* (*Bishop*) v. *Young* (1750), 2 Ves. Sen. 91, 95; *Clennell* v. *Lewthwaite, Thornton* v *Tracy*, (1794), 2 Ves. 465, 474; *Langham* v. *Sanford* (1816), 19 Ves. 641; *Gladding* v. *Yapp* (1820), 5 Madd. 56.

(*s*) See title DESCENT AND DISTRIBUTION, Vol. XI., pp. 16 *et seq.*

(*t*) Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), s. 13; see also title LIMITATION OF ACTIONS.

(*a*) *Re Johnson, Sly* v. *Blake* (1885), 29 Ch. D. 964; see remarks of CHITTY, J., at p. 973, as to *dicta* of Lord ROMILLY, M.R., in *Reed* v. *Fenn* (1866), 35 L. J. (CH.) 464.

(*b*) *Re Johnson, Sly* v. *Blake, supra.*

(*c*) *Walker* v. *Jackson* (1743), 2 Atk. 624; *Ancaster* (*Duke*) v. *Mayer* (1785), 1 Bro. C. C. 454.

(*d*) See Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 2 (3); and see p. 238, *ante.*

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the general personal estate, the burden of the debts must be borne by the latter (*e*); but a liability which is naturally incident to any particular form of property must be borne by that property. Thus a fine, incident to the preservation of a lease, must be paid by the person to whom the term is bequeathed (*f*); and it has been held that the legatee of leasehold property which is out of repair is not entitled to have it put into repair at the expense of the testator's general estate (*g*). So, too, calls made subsequent to the death upon partly paid shares must be paid by the legatee of the shares (*h*). But liabilities accrued due at the date of death, whether in respect of rent (*i*) or in respect of calls made before death (*k*), are payable, like other debts, out of the general personal estate.

Specific fund appropriated for payment of debts.

663. Where a testator has appropriated a specific portion of his personal estate for the payment of his debts, that portion is the primary fund for payment, provided that the testator has disposed of his residuary personal estate (*l*), but not where the residuary personal estate is undisposed of (*m*).

Where realty made primary fund.

664. A testator may, of course, make his realty the primary fund for payment of his debts, but in order to do so he must either expressly exonerate his personal estate or use language which shows a manifest intention that his personal estate should be exonerated (*n*). An express charge of debts upon his realty (*o*), or an express devise of his realty in trust for payment of debts (*p*), is in itself insufficient to displace the ordinary rule that the personal estate is the primary fund; the charge or trust is treated as the constitution merely of an auxiliary fund for payment of debts, and the ordinary rule is only displaced where from the rest of the will it can be clearly gathered that the testator intended to exonerate his personal estate (*q*).

(*e*) *Clarke* v. *Ormonde* (*Earl*) (1821), Jac. 108.

(*f*) *Fitzwilliams* v. *Kelly* (1852), 10 Hare, 266.

(*g*) *Hickling* v. *Boyer* (1851), 16 Jur. 137; doubted in *Harris* v. *Poyner* (1852), 1 Drew. 174.

(*h*) *Armstrong* v. *Burnet* (1855), 20 Beav. 424; *Addams* v. *Ferick* (1859), 26 Beav. 384. Distinguish from the ordinary case of partly paid shares such cases as *Blount* v. *Hipkins* (1834), 7 Sim. 43, 51; *Jaques* v. *Chambers* (1846), 16 L. J. (CH.) 243; *Clive* v. *Clive* (1854), Kay. 600.

(*i*) *Barry* v. *Harding* (1844), 1 Jo. & Lat. 475.

(*k*) *Addams* v. *Ferick*, *supra*.

(*l*) *Browne* v. *Groombridge* (1819), 4 Madd. 495; *Choat* v. *Yeats* (1819), 1 Jac. & W. 102; *Trott* v. *Buchanan* (1885), 28 Ch. D. 446.

(*m*) *Hewett* v. *Snare* (1847), 1 De G. & Sm. 333; *Lomax* v. *Lomax* (1849), 12 Beav. 285; *Newbegin* v. *Bell* (1857), 23 Beav. 386.

(*n*) *Bootle* v. *Blundell* (1815), 1 Mer. 193, *per* Lord ELDON, L.C., at pp. 219, 220; *Bickham* v. *Cruttwell* (1838), 3 My. & Cr. 763; *Forrest* v. *Prescott* (1870), L. R. 10 Eq. 545, *per* MALINS, V.-C., at p. 549; *Kilford* v. *Blaney* (1885), 31 Ch. D. 56, C. A., *per* Lord HALSBURY, L.C., at p. 62.

(*o*) *Tait* v. *Northwick* (*Lord*) (1799), 4 Ves. 816, 823; *Re Banks*, *Banks* v. *Busbridge*, [1905] 1 Ch. 547.

(*p*) *M'Cleland* v. *Shaw* (1805), 2 Sch. & Lef. 538; *Rhodes* v. *Rudge* (1826), 1 Sim. 79.

(*q*) For cases in which the personal estate has been held to be exonerated, see *Burton* v. *Knowlton* (1796), 3 Ves. 107; *Bootle* v. *Blundell*, *supra*; *Greene* v.

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Where exonerated gift lapses.

665. The right to exoneration does not enure for the benefit of a person who becomes entitled to a lapsed gift, whether the fund appropriated to the exoneration be one of realty (*r*) or of specific personal assets (*s*), the right to the benefit of the exoneration being, in fact, a part of the legacy which fails (*t*). Thus, if a testator charges his real estate with payment of his debts in exoneration of his personal estate, and bequeaths his personal estate to a legatee who predeceases him, the personal estate is not exonerated in the hands of the next of kin.

Mixed fund of realty and personalty.

666. Where a testator combines his real and personal estate into one general fund, and directs the whole of that fund to be applied for certain purposes, such as the payment of debts or legacies, his real and personal estate must be applied in the discharge of the debts or legacies rateably according to their respective values (*u*).

How created.

A gift of real and personal estate together, coupled with a direction to sell and to pay debts or legacies out of the proceeds, creates a mixed fund, and in that case the realty and personalty are liable rateably for debts (*a*); a direction that the real estate is to be sold, and that the proceeds of sale are to be considered as part of the personal estate, will have the same effect (*b*). It is not necessary that there should be an absolute conversion directed by the will; a power of sale may be sufficient if, from the terms of the will as a whole, it can be gathered that the testator had the intention of creating a mixed fund (*c*). The mere gift of real and personal estate together, coupled with a direction to pay debts or legacies, or a trust for the payment of debts or legacies, is not by itself sufficient to constitute a mixed fund, in the absence of words in the will showing an intention on the testator's part that his real estate should be sold for the purpose of meeting the debts or legacies (*d*).

Greene (1819), 4 Madd. 148; *Michell* v. *Michell* (1820), 5 Madd. 69; *Lance* v. *Aglionby* (1859), 27 Beav. 65; *Gilbertson* v. *Gilbertson* (1865), 34 Beav. 354; *Forrest* v. *Prescott* (1870), L. R. 10 Eq. 545; *Kilford* v. *Blaney* (1885), 31 Ch. D. 56, C. A. For cases in which the personal estate has been held not to be exonerated, see *French* v. *Chichester* (1707), 2 Vern. 568; *Haslewood* v. *Pope* (1734), 3 P. Wms. 322; *Ancaster (Duke)* v. *Mayer* (1785), 1 Bro. C. C. 454; *Tait* v. *Northwick (Lord)* (1799), 4 Ves. 816; *M'Cleland* v. *Shaw* (1805), 2 Sch. & Lef. 538; *Brummel* v. *Prothero* (1796), 3 Ves. 111; *Aldridge* v. *Wallscourt (Lord)* (1810), 1 Ball & B. 312; *Tower* v. *Rous (Lord)* (1811), 18 Ves. 132; *Rhodes* v. *Rudge* (1826), 1 Sim. 79; *Trott* v. *Buchanan* (1885), 28 Ch. D. 446; *Re Banks, Banks* v. *Busbridge* [1905] 1 Ch. 547.

(*r*) *Dacre* v. *Patrickson* (1860), 1 Drew. & Sm. 182.

(*s*) *Kilford* v. *Blaney* (1885), 31 Ch. D. 56, C. A., overruling on this point *Browne* v. *Groombridge* (1819), 4 Madd. 495.

(*t*) *Kilford* v. *Blaney*, *supra*, at p. 66.

(*u*) *Roberts* v. *Walker* (1830), 1 Russ. & M. 752; *Simmons* v. *Rose* (1856), 6 De G. M. & G. 411.

(*a*) *Roberts* v. *Walker*, *supra*; *Stocker* v. *Harbin* (1841), 3 Beav. 479; *Salt* v. *Chattaway* (1841), 3 Beav. 576; *Dunk* v. *Fenner* (1831), 2 Russ. & M. 557; *Fourdrin* v. *Gowdey* (1834), 3 My. & K. 383; *Tatlock* v. *Jenkins* (1854), Kay, 654; *Bedford* v. *Bedford* (1865), 35 Beav. 584.

(*b*) *Kidney* v. *Coussmaker*, *Williams* v. *Coussmaker* (1792), 1 Ves. 436; *Bright* v. *Larcher* (1858), 3 De G. & J. 148; *Simmons* v. *Rose* (1856), 6 De G. M. & G. 411.

(*c*) *Allan* v. *Gott* (1872), 7 Ch. App. 439, C. A.

(*d*) *Boughton* v. *Boughton*, *Boughton* v. *James* (1848), 1 H. L. Cas. 406; *Tench*

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Completion of uncompleted buildings.

667. Where a person has entered into a contract for the erection of buildings upon his land, and the buildings are not completed at the date of his death, his heir or the devisee of the land is entitled to have the buildings completed at the expense of the general personal estate (*e*).

SUB-SECT. 2.—*In Payment of Secured Debts.*

Debts secured upon pure personalty.

668. A legatee of a specific chattel or other pure personal estate of a testator subject to a mortgage is entitled, in the absence of a contrary direction, to have the mortgage debt discharged out of the general personal estate (*f*), and if that prove deficient, out of any other portion of the estate which the testator has expressly subjected to the payment of his debts (*g*). If the executor fail to redeem, the specific legatee is entitled to compensation to the amount of the legacy out of the general assets of the testator (*h*). As between specific legatees, the legatee of incumbered property must bear the burden of the incumbrance (*i*).

Incumbrances on realty or chattels real. Locke King's Acts.

669. The successor to an interest in incumbered real or chattel real estate is, in the absence of a direction to the contrary, precluded from throwing the burden of the incumbrance upon the deceased's personal or other real estate (*k*), whether the incumbrance be by way of mortgage or equitable charge, or in respect of a vendor's lien for unpaid purchase-money (*l*), and whether the deceased died testate or intestate.

This rule applies only to disputes between different persons claiming under or through the deceased (*m*); and is not, therefore,

v. *Cheese* (1855), 6 De G. M. & G. 453; *Wells* v. *Row* (1879), 48 L. J. (CH.) 476; *Luckcraft* v. *Pridham* (1879), 48 L. J. (CH.) 636.

(*e*) *Marshall* v. *Holloway* (1832), 5 Sim. 196; *Cooper* v. *Jarman* (1866), L. R. 3 Eq. 98; *Re Day, Sprake* v. *Day*, [1898] 2 Ch. 510; and see title BUILDING CONTRACTS, ENGINEERS AND ARCHITECTS, Vol. III., p. 272.

(*f*) *Knight* v. *Davis* (1833), 3 My. & K. 358; *Bothamley* v. *Sherson* (1875), L. R. 20 Eq. 304. For this purpose, a debenture in a company is personal estate, though it includes a charge on land (*Re Chantrell, Sutleffe* v. *Von Liverhoff*, [1907] W. N. 213; as to discharge of mortgages generally, see title MORTGAGE.

(*g*) In *Re Butler, Le Bas* v. *Herbert*, [1894] 3 Ch. 250, KEKEWICH, J., held that a constructive charge of debts upon realty, created by a direction that the testator's debts should be paid, did not entitle the specific legatee to throw the burden of the incumbrance upon the specific devisees of the realty.

(*h*) *Knight* v. *Davis, supra*; and see title EQUITY, Vol. XIII., p. 144.

(*i*) *Halliwell* v. *Tanner* (1830), 1 Russ. & M. 633; *Re Butler, Le Bas* v. *Herbert, supra*.

(*k*) Real Estate Charges Acts, 1854, 1867 and 1877 (17 & 18 Vict. c. 113; 30 & 31 Vict. c. 69; 40 & 41 Vict. c. 34). The three Acts, known as Locke King's Acts, are to be read together, and apply equally to next of kin as to legatees (*Re Fraser, Lowther* v. *Fraser*, [1904] 1 Ch. 726, C. A.); they do not impose any personal liability on the devisee (*Syer* v. *Gladstone* (1885), 30 Ch. D. 614, 616.

(*l*) The Acts cover an equitable charge of whatever nature, including a statutory charge for estate duty (see *Re Bowerman, Porter* v. *Bowerman*, [1908] 2 Ch. 340); they also apply to land which has been delivered in execution under a writ of *elegit* (*Re Anthony, Anthony* v. *Anthony*, [1892] 1 Ch. 450).

(*m*) Real Estate Charges Act, 1854 (17 & 18 Vict. c. 113), s. 1.

applicable at the instance of a residuary legatee against a specific devisee, where the devised estate has been mortgaged to secure a partnership debt, and the partnership assets are sufficient to repay the advance (*n*), nor to charges affecting an estate which descends to a tenant in tail under a settlement not made by the deceased (*o*).

What constitutes a charge.

670. A general charge upon the real estate in aid of the personal estate to pay legacies or debts, or both, is not a charge within the rules, as the object and intention of the provision is not, in such a case, to alter the administration of assets nor to make the real estate primarily liable to the exoneration of the personal estate (*p*).

What constitutes a contrary intention.

A charge of or direction for payment of debts upon or out of a testator's residuary real and personal estate or residuary real estate is not a sufficient signification of a contrary intention (*q*); the intention must be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate (*r*). Thus a direction to pay debts, except mortgage debts on Blackacre, out of the residue, is sufficient indication of an intention to throw on the residue a mortgage debt on Whiteacre (*s*); the realty will also be exonerated if, in the direction to pay debts, a debt is included by a description sufficient to identify it as being a debt which happens to be secured by mortgage (*t*). The contrary intention need not appear in the will, it may be gathered from the mortgage deeds themselves (*a*).

When several properties comprised in one mortgage.

671. Where several properties are comprised in one mortgage, and are devised to different devisees, the devisees must, in the absence of a contrary intention, bear the debt rateably (*b*), even though one of the properties passes only under a residuary devise (*c*): the same rule applies where freeholds or leaseholds and pure personalty are comprised in one mortgage (*d*), and between the heir-at-law and next of kin in case of intestacy (*e*).

(*n*) *Re Ritson, Ritson* v. *Ritson*, [1899] 1 Ch. 128, C. A.

(*o*) *Re Anthony, Anthony* v. *Anthony*, [1893] 3 Ch. 498. It has been held that a gift of moneys arising from the sale of realty under the trusts of a superior settlement does not come within the Acts (see *Lewis* v. *Lewis* (1871), L. R. 13 Eq. 218).

(*p*) *Hepworth* v. *Hill* (1862), 30 Beav. 476, *per* ROMILLY, M.R., at p. 483.

(*q*) Real Estate Charges Act, 1877 (40 & 41 Vict. c. 34), s. 1.

(*r*) Real Estate Charges Act, 1867 (30 & 31 Vict. c. 69), s. 1.

(*s*) *Re Valpy, Valpy* v. *Valpy*, [1906] 1 Ch. 531. A direction to pay the mortgage debt on Whiteacre out of the proceeds of sale of Blackacre does not enable the devisees of Whiteacre to go against the general estate for any deficiency (*Re Birch, Hunt* v. *Thorn*, [1909] 1 Ch. 787, explaining *Allen* v. *Allen* (1862), 30 Beav. 395, 403).

(*t*) *Re Fleck, Colston* v. *Roberts* (1888), 37 Ch. D. 677.

(*a*) Real Estate Charges Act, 1854 (17 & 18 Vict. c. 113), s. 1; *Re Campbell, Campbell* v. *Campbell*, [1893] 2 Ch. 206.

(*b*) Real Estate Charges Act, 1854 (17 & 18 Vict. c. 113), s. 1; *Re Newmarch, Newmarch* v. *Storr* (1878), 9 Ch. D. 12, 17, C. A.

(*c*) *Re Smith, Hannington* v. *True, Giles* v. *True* (1886), 33 Ch. D. 195, dissenting from *Brownson* v. *Lawrence* (1868), L. R. 6 Eq. 1.

(*d*) *Trestrail* v. *Mason* (1878), 7 Ch. D. 655; *Leonino* v. *Leonino* (1879), 10 Ch. D. 460.

(*e*) *Evans* v. *Wyatt* (1862), 31 Beav. 217.

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The fact that one property is devised to a person absolutely (*f*), or for life (*g*), and that other properties are directed to fall into residue, is not an indication of a contrary intention. But it may be gathered from the language of the documents, or from the nature of the transaction, that one property was intended to form a primary security and the other a secondary security (*h*). The use of the word "collateral," or the fact that one property was brought in subsequently on the occasion of a further advance, is not of itself sufficient to constitute the further security a secondary security only (*i*).

Collective devise.

A collective devise of lands of any tenure to the same set of persons *primâ facie* throws the aggregate charges on to the aggregate lands in exoneration of the testator's personal estate (*k*).

SUB-SECT. 3.—*Liability of Real Estate for Payment of Legacies.*

General rule.

672. The general rule is that pecuniary legacies, in the absence of a sufficient indication of a contrary intention, are payable out of the personal estate not specifically bequeathed (*l*).

Where there is a bequest of pecuniary legacies, followed by a gift of the residue of the testator's real and personal estate, it is a general rule of construction that the residuary real estate is charged with the payment of the legacies in aid of the personal estate (*m*). For the application of this rule it is not necessary that the testator should use the word "residue," and a gift of realty and personalty in terms which substantially amount to a residuary gift is sufficient (*n*): the rule applies whether the legacies are given before or after the gift of residue (*o*). Where there is simply a charge of legacies upon real estate, that charge is nothing more than ancillary to the personal estate, and cannot be enforced against the real estate where the personal estate is sufficient to pay all the legacies (*p*).

Where personalty wasted.

673. If the personal estate is sufficient at the time the legacy becomes payable, a subsequent wasting of the assets before the legacy is actually paid will not throw the legacy upon the real

(*f*) *Re Smith, Hannington* v. *True, Giles* v. *True* (1886), 33 Ch. D. 195, following *Gibbins* v. *Eyden* (1869), L. R. 7 Eq. 371.

(*g*) *Sackville* v. *Smyth* (1873), L. R. 17 Eq. 153.

(*h*) Such an intention was found in *Lipscomb* v. *Lipscomb* (1868), L. R. 7 Eq. 501; *De Rochefort* v. *Dawes* (1871), L. R. 12 Eq. 540, but was not found in *Leonino* v. *Leonino* (1879), 1 Ch. D. 460; *Re Athill, Athill* v. *Athill* (1880), 16 Ch. D. 211, C. A.

(*i*) *Re Athill, Athill* v. *Athill, supra, per* COTTON, L.J., at pp. 225, 226.

(*k*) *Re Kensington (Baron), Longford (Earl)* v. *Kensington (Baron)*, [1902] 1 Ch. 203.

(*l*) *Robertson* v. *Broadbent* (1883), 8 App. Cas. 812.

(*m*) *Greville* v. *Browne* (1859), 7 H. L. Cas. 689; *Re Brooke, Brooke* v. *Rooke* (1876), 3 Ch. D. 630.

(*n*) *Re Bawden, National Provincial Bank of England* v. *Cresswell, Bawden* v. *Cresswell*, [1894] 1 Ch. 693; *Re Smith, Smith* v. *Smith*, [1899] 1 Ch. 365; *Re Balls, Trewby* v. *Balls*, [1909] 1 Ch. 791.

(*o*) *Re Balls, Trewby* v. *Balls, supra.*

(*p*) *Re Ovey, Broadbent* v. *Barrow* (1885), 31 Ch. D. 113, *per* PEARSON, J., at p. 118.

estate (*q*), except where the executor and the devisee are the same person (*r*).

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674. The presumption is against an intention to charge lands specifically devised, and a mere charge on all the testator's lands is not sufficient to rebut the presumption (*s*); but the question must always be one of intention (*t*).

Where land specifically devised.

675. Where the testator's real and personal property have been so blended together as to form a mixed fund for the payment of legacies, the legacies must be borne by the real and personal estate rateably (*a*). The rule, however, as to rateable payment out of a mixed fund does not extend beyond the things which the testator has expressly directed to be paid out of the fund (*b*); and it may accordingly occur that the realty comprised in the fund may be charged rateably with the payment of debts, but only in aid of the personalty in discharge of the legacies (*c*).

Mixed fund.

676. A testator may make his real estate the primary fund for payment of legacies; he may also make it the exclusive fund, and questions occasionally arise as to whether the legatee can have recourse to the personalty. Where the testator shows a separate and independent intention that the money shall be paid to the legatee at all events, the intention will not be held to be controlled merely by a direction in the will that the money is to be raised in a particular way or out of a particular fund (*d*), and in such a case recourse may be had to the personal estate, in the event of the real estate proving deficient (*e*). But where the testator simply charges his real estate with a sum of money, and then bequeaths the money so charged, the real estate alone is liable to the payment (*f*):

Realty may be either primary or exclusive fund for payment of legacies.

SUB-SECT. 4.—*Marshalling.*

677. For the purpose of marshalling (*g*), the order in which the assets should be applied in payment of debts is as follows:—

Marshalling. Order of application.

1. The general or residuary personalty, not exonerated or

(*q*) *Richardson* v. *Morton* (1871), L. R. 13 Eq. 123.

(*r*) *Howard* v. *Chaffers*, *Howard* v. *Robinson* (1869), 2 Drew. & Sm. 236; *Humble* v. *Humble* (1838), 2 Jur. 696.

(*s*) *Conron* v. *Conron* (1858), 7 H. L. Cas. 168, *per* Lord CRANWORTH, at p. 190; *Spong* v. *Spong* (1829), 3 Bli. (N. S.) 84, H. L.

(*t*) *Bank of Ireland* v. *McCarthy*, [1898] A. C. 181.

(*a*) As to mixed fund for payment of debts and legacies, see p. 287, *ante*.

(*b*) *Elliott* v. *Dearsley* (1880), 16 Ch. D. 322, C. A., *per* JAMES, L.J., at p. 329.

(*c*) *Elliott* v. *Dearsley*, *supra*; *Re Boards*, *Knight* v. *Knight*, [1895] 1 Ch. 499, overruling *dictum* of JESSEL, M.R., in *Gainsford* v. *Dunn* (1874), L. R. 17 Eq. 405, at p. 408.

(*d*) *Dickin* v. *Edwards* (1844), 4 Hare, 273, *per* WIGRAM, V.-C., at p. 276.

(*e*) For cases in which real estate has been held the primary fund, see *Savile* v. *Blacket* (1722), 1 P. Wms. 777; *Welby* v. *Rockcliffe* (1830), 1 Russ. & M. 571; *Williams* v. *Hughes* (1857), 24 Beav. 474.

(*f*) *Dickin* v. *Edwards*, *supra*, *per* WIGRAM, V.-C., at p. 273; see, also, *Spurway* v. *Glynn* (1804), 9 Ves. 483.

(*g*) For the doctrine of marshalling as applied in the distribution of assets, see title EQUITY, Vol. XIII., pp. 144, 146.

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exempted (*h*). Where a share of the residuary personalty lapses the debts are not payable primarily out of the lapsed share (*i*).

2. Real estate specifically appropriated to or devised in trust for payment of debts (*k*).

3. Real estate descended (*l*).

4. Real estate devised, charged with the payment of debts (*m*). The fact that real estate vests in the personal representative in the case of a person dying on or since the 1st January, 1898, has not affected this rule (*n*). Where a share of realty charged with payment of debts lapses, the lapsed share bears only its rateable proportion of the debts (*o*).

5. General pecuniary legacies rateably (*p*). Where some pecuniary legacies are charged on land and others not, the persons entitled to the latter may have the land marshalled, in the event of the former being paid out of personalty (*q*).

6. Real estate devised, whether specifically or as residue (*r*), and personal estate specifically bequeathed rateably (*s*). But neither

(*h*) *Davies* v. *Topp* (1780), 1 Bro. C. C. 524; *Manning* v. *Spooner* (1796), 3 Ves. 114, 117; *Harmood* v. *Oglander* (1803), 8 Ves. 106, 124.

(*i*) *Trethewy* v. *Helyar* (1876), 4 Ch. D. 53; *Fenton* v. *Wills* (1877), 7 Ch. D. 33. There are, however, conflicting authorities (*Re Ham's Trust, Ex parte Biles* (1851), 2 Sim. (N. S.) 106; *Gowan* v. *Broughton* (1874), L. R. 19 Eq. 77; *Scott* v. *Cumberland* (1874), L. R. 18 Eq. 578).

(*k*) *Galton* v. *Hancock* (1744), 2 Atk. 430; *Donne* v. *Lewis* (1787), 2 Bro. C. C. 257; *Manning* v. *Spooner*, *supra*; *Harmood* v. *Oglander*, *supra*; *Milnes* v. *Slater* (1803), 8 Ves. 295, 304; *Phillips* v. *Parry* (1856), 22 Beav. 279; *Stead* v. *Hardaker* (1873), L. R. 15 Eq. 175.

(*l*) See cases cited in note (*k*), *supra*, and *Barber* v. *Wood* (1877), 4 Ch. D. 885; *Wride* v. *Clark* (1766), 2 Bro. C. C. 261, n. As between a specific legatee and the heir, where the general estate is insufficient to meet the estate duty in respect of the personalty, the burden falls upon the descended realty (*Re Pullen, Parker* v. *Pullen*, [1910] 1 Ch. 564, distinguishing *Shepheard* v. *Beetham* (1877), 6 Ch. D. 597). See also title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 316.

(*m*) *Aldrich* v. *Cooper* (1803), 8 Ves. 382, 396; *Re Stokes, Parsons* v. *Miller* (1892), 67 L. T. 223; *Re Salt, Brothwood* v. *Keeling*, [1895] 2 Ch. 203; *Re Roberts, Roberts* v. *Roberts*, [1902] 2 Ch. 834, holding that *Re Bate, Bate* v. *Bate* (1890), 43 Ch. D. 600, has been overruled.

(*n*) *Re Kempster, Kempster* v. *Kempster*, [1906] 1 Ch. 446. The head-note to this case appears to be wrong in referring to land devised subject to an "express" charge of debts; the charge was in fact a constructive charge only, arising from the direction contained in the will for the payment of the testator's just debts and funeral and testamentary expenses.

(*o*) *Ryves* v. *Ryves* (1871), L. R. 11 Eq. 539, following *Wood* v. *Ordish* (1855), 3 Sm. & G. 125, and *Fisher* v. *Fisher* (1838), 2 Keen, 610; *Re Rathborne* (1860), 11 I. Ch. R. 141.

(*p*) The decision in *Hensman* v. *Fryer* (1867), 3 Ch. App. 420, that where the general personal estate is insufficient for the payment of debts and legacies pecuniary legatees and the residuary devisee contribute rateably is incorrect, and ought not to be followed; see *Collins* v. *Lewis* (1869), L. R. 8 Eq. 708; *Dugdale* v. *Dugdale* (1872), L. R. 14 Eq. 234; *Tomkins* v. *Colthurst* (1875), 1 Ch. D. 626; *Farquharson* v. *Floyer* (1876), 3 Ch. D. 109.

(*q*) *Bligh* v. *Darnley* (*Earl*) (1731), 2 P. Wms. 620; *Scales* v. *Collins* (1852), 9 Hare, 656.

(*r*) *Hensman* v. *Fryer*, *supra*; *Lancefield* v. *Iggulden* (1874), 10 Ch. App. 136.

(*s*) *Tombs* v. *Roch* (1846), 2 Coll. 490; *Bateman* v. *Hotchkin* (1847), 10 Beav. 426, 434; *Powell* v. *Riley* (1871), L. R. 12 Eq. 175; *Jackson* v. *Pease* (1874), L. R. 19 Eq. 96; *Re Maddock, Llewelyn* v. *Washington*, [1902] 2 Ch. 220, C. A.

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portions (*t*) nor legacies (*a*) charged on the real estate are liable to contribute with the real estate or the specific legacies. As between real estate charged with portions or legacies, and specific devises and legacies, the real estate must contribute according to its full value, without any deduction for the portions or legacies charged upon it (*b*).

7. Real and personal property expressly appointed by will in exercise of a general power of appointment (*c*). In cases, however, where the power is executed by reason of a bequest of the testator's personal estate, or of any bequest of personal property described in a general manner, personal property the subject of the general power is included in the bequest (*d*); it forms part of the testator's personal estate, and therefore goes in exactly the same way as his other personal estate, and is not necessarily postponed, as a fund liable for the payment of his debts, to other assets of the testator (*e*). To make the property assets at all the power must be actually exercised (*f*).

Part V.—Powers and Rights of the Representative.

SECT. 1.—*To Carry on the Testator's Business.*

Express power necessary.

678. An executor has no power, in the absence of a direction contained in his testator's will, to carry on the testator's business (*g*) except for the purpose of winding it up (*h*). A general power to postpone the conversion of a testator's estate bequeathed upon

(*t*) *Raikes* v. *Boulton* (1860), 29 Beav. 41; *Re Saunders-Davies, Saunders-Davies* v. *Saunders-Davies* (1887), 34 Ch. D. 482.

(*a*) *Re Bawden, National Provincial Bank of England* v. *Cresswell, Bawden* v. *Cresswell*, [1894] 1 Ch. 693.

(*b*) *Ibid.* The respective values must be ascertained as at the date of the testator's death (*Fielding* v. *Preston* (1857), 1 De G. & J. 438). Where real estate subject to an incumbrance has been specifically devised free from incumbrances, so as to exclude the operation of Locke King's Acts, the old rule still holds good that a pecuniary legatee is entitled to have recourse against the devised realty to the extent to which the incumbrance has been discharged out of the personal estate (*Re Smith, Smith* v. *Smith*, [1899] 1 Ch. 365).

(*c*) *Jenney* v. *Andrews* (1822), Madd. & G. 264; *Fleming* v. *Buchanan* (1853), 3 De G. M. & G. 976, C. A.; *Beyfus* v. *Lawley*, [1903] A. C. 411.

(*d*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 27.

(*e*) *Williams* v. *Williams, Re Hartley, Williams* v. *Jones*, [1900] 1 Ch. 152.

(*f*) *Holmes* v. *Coghill* (1802), 7 Ves. 499; (1806) 12 Ves. 206. As to powers generally, see title POWERS.

The widow's paraphernalia might formerly have been resorted to after all her husband's property was exhausted (*Ridout* v. *Plymouth* (*Earl*) (1740), 2 Atk. 104; *Snelson* v. *Corbet* (1746) 3 Atk. 369; *Aldrich* v. *Cooper* (1803), 8 Ves. 382, 392); but articles which were formerly designated paraphernalia seem now to belong absolutely to the wife (*Masson, Templier & Co.* v. *De Fries*, [1909] 2 K. B. 831, 836—838, C. A.); see p. 219, *ante*.

(*g*) *Kirkman* v. *Booth* (1848), 11 Beav. 273.

(*h*) *Collinson* v. *Lister* (1855), 20 Beav. 356.

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trust for sale is sufficient authority to an executor to carry on the business for a reasonable period with a view to selling it as a going concern (*i*), but does not apparently authorise him to carry it on indefinitely (*k*). But although the executor may have no express authority to continue the business, it is his duty to do whatever may be required to be done to preserve the business as an asset (*l*), and if he acts *bonâ fide* and to the best of his judgment he is not liable for a breach of trust by reason of continuing it for some years (*m*).

What funds may be employed.

679. An executor who is authorised to carry on the business is not entitled to employ in the business any of the general assets of his testator beyond the fund directed to be so employed (*n*): where the testator has not authorised the employment of any of his general assets the executor is only entitled to employ the assets already embarked in the business (*o*).

Borrowing powers.

680. If the executor finds it impossible to carry on the business with the assets already engaged in it, or authorised by his testator, he should apply to the court by originating summons for its directions (*p*). He has no power to borrow money for the purpose and charge his testator's assets outside of the business with repayment of the loan (*q*), though he can give a valid charge upon the assets already engaged in the business (*r*). Where the representative has express authority to increase the business, he is entitled to borrow money and secure the loan by mortgage of assets outside the business (*a*).

Power to executors is no authority to administrator with the will annexed.

681. A power to an executor to carry on his testator's business does not upon his renouncing empower an administrator with the will annexed to do so (*b*); nor will the court authorise an administrator to carry on an intestate's trade where the parties interested are not *sui juris* (*c*).

Executor's liability and right to indemnity.

682. The executor is personally liable upon all contracts into which he enters and for all debts which he incurs in carrying on his testator's business (*d*), notwithstanding that he avowedly

(*i*) *Re Chancellor, Chancellor* v. *Brown* (1884), 26 Ch. D. 42, C. A.; *Re Smith, Arnold* v. *Smith*, [1896] 1 Ch. 171.

(*k*) *Re Smith, Arnold* v. *Smith, supra, per* NORTH, J., at p. 174, commenting upon *Re Crowther, Midgley* v. *Crowther*, [1895] 2 Ch. 56.

(*l*) *Strickland* v. *Symons* (1883), 22 Ch. D. 666, *per* POLLOCK, B., at p. 671; see, too, *Marshall* v. *Broadhurst* (1831), 1 Cr. & J. 403.

(*m*) *Garrett* v. *Noble* (1834), 6 Sim. 504.

(*n*) *Ex parte Garland* (1804), 10 Ves. 110; *Cutbush* v. *Cutbush* (1839), 1 Beav. 184.

(*o*) *Re Hodson, Ex parte Richardson* (1818), 3 Madd. 138.

(*p*) *M'Neillie* v. *Acton* (1853), 4 De G. M. & G. 744, C. A.

(*q*) *Ibid.*

(*r*) *Devitt* v. *Kearney* (1883), 13 L. R. Ir. 45, C. A.

(*a*) See *Re Dimmock, Dimmock* v. *Dimmock* (1885), 52 L. T. 494.

(*b*) *Lambert* v. *Rendle* (1863), 3 New Rep. 247.

(*c*) *Land* v. *Land* (1874), 43 L. J. (CH.) 311.

(*d*) *Ex parte Garland, supra; Re Hodson, Ex parte Richardson, supra; Owen* v. *Delamere* (1872), L. R. 15 Eq. 134; *Fairland* v. *Percy* (1875), L. R. 3

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contracts as representative (*e*); but he is entitled to be indemnified out of the assets in respect of all liabilities properly incurred in carrying on a business, even in priority to the claims of the creditors of his testator, where he has carried it on for such reasonable time as is necessary to enable him to sell the business as a going concern (*f*).

Executor's indemnity.

It rests upon the executor to prove that he has acted with a view to selling the business as a going concern (*g*).

(i.) Where directed to carry on business.

A direction contained in the will for the continuance of the testator's business being binding upon the beneficiaries, the executor is as against them entitled to resort to the assets authorised to be employed in the business to indemnify himself against liabilities incurred in carrying it on (*h*); the direction is not, however, binding upon the testator's creditors, and the executor cannot by reason only of such authority maintain a claim to indemnity as against them (*i*). But where those creditors have assented to the continuance of the business, the executor is entitled to be indemnified out of the estate in priority to their claims (*k*), and the indemnity is not to be limited to that portion of the assets which has come into existence, or changed its form since the death (*l*): the assent may be implied from the conduct of the creditors in not interfering with the continuance of the business (*m*). In the case of assent by the testator's creditors the right to an indemnity exists independently of any authority by the testator to continue the business (*n*).

(ii.) Where business carried on by consent of creditors.

Executor's creditors' right to claim indemnity.

683. The remedy of a creditor for a debt contracted after the death is against the executor, and not against the estate (*o*); but the creditor is in equity entitled to stand in the place of the executor, and to claim the benefit of his right to an indemnity (*p*). Thus, where the business has been continued by the executor with the assent of the testator's creditors, the creditors of the executor are entitled to payment in priority to those of the testator (*q*).

P. & D. 217; *Re Morgan, Pillgrem* v. *Pillgrem* (1881), 18 Ch. D. 93, 99, C. A.; *Re Evans, Evans* v. *Evans* (1887), 34 Ch. D. 597.

(*e*) *Labouchere* v. *Tupper* (1857), 11 Moo. P. C. C. 198; *Liverpool Borough Bank* v. *Walker* (1859), 4 De G. & J. 24, C. A.

(*f*) *Dowse* v. *Gorton*, [1891] A. C. 190, *per* Lord HERSCHELL, at p. 199.

(*g*) *Re Millard, Ex parte Yates* (1895), 72 L. T. 823, C. A.

(*h*) *Ex parte Garland* (1804), 10 Ves. 110; *Re Beater, Ex parte Edmonds* (1862), 4 De G. F. & J. 488, 498, C. A.

(*i*) *Dowse* v. *Gorton, supra, per* Lord HERSCHELL, at p. 199; *Re Millard, Ex parte Yates, supra; Lucas* v. *Williams* (No. 2) (1862), 4 De G. F. & J. 439, C. A.

(*k*) *Dowse* v. *Gorton, supra.*

(*l*) *Ibid.*

(*m*) *Re Brooke, Brooke* v. *Brooke*, [1894] 2 Ch. 600; *Re Hodges, Hodges* v. *Hodges*, [1899] 1 I. R. 480. In *Re Millard, Ex parte Yates, supra*, the conduct of the creditors was held not to amount to an assent.

(*n*) *Ibid.*

(*o*) *Farhall* v. *Farhall* (1871), 7 Ch. App. 123; *Owen* v. *Delamere* (1872), L. R. 15 Eq. 134.

(*p*) *Re Beater, Ex parte Edmonds* (1862), 4 De G. F. & J. 488, 498, C. A.; *Re Johnson, Shearman* v. *Robinson* (1880), 15 Ch. D. 548; *Re Evans, Evans* v. *Evans* (1887), 34 Ch. D. 597, C. A.; *Moore* v. *M'Glynn*, [1904] 1 I. R. 334. For right of subrogation generally, see title EQUITY, Vol. XIII., p. 149.

(*q*) *Re Hodges, Hodges* v. *Hodges, supra.* The same rule applies where the executor has continued the business under an administration order (*Tinkler* v. *Hindmarsh* (1840), 2 Beav. 348).

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Limitation where executor in default.

This right is, however, strictly confined to the assets to which the executor himself could have resorted for an indemnity (*r*). Accordingly, where the executor has lost his right to an indemnity by reason of his being in default to the estate, the creditors are in no better position, and are not entitled to have their debts paid out of the specific assets unless the default is made good (*s*). Where there are several executors, one of whom is in default to the trust estate, but the others can show clear accounts, the creditors can claim the benefit of the indemnity to which the executors with the clear accounts are entitled (*t*). A mere default in rendering accounts is not sufficient to destroy the indemnity: there must be an indebtedness to the estate on the part of the executors (*a*).

Right to administration order.

684. The right of a trade creditor to the benefit of the executor's indemnity entitles him to an order for the administration of the testator's estate (*b*).

As between the executor and his trade creditors, the right of the former to an indemnity out of the assets for his costs and expenses prevails over the right of the latter to be paid out of such assets (*c*).

SECT. 2.—*To Alienate.*

Power of alienation in case of personalty.

685. The personal representative has a complete and absolute control over the personal property of the deceased, and he can dispose of the effects, whether they be legal or equitable (*d*), by mortgage or pledge as well as by sale (*e*), notwithstanding that the property disposed be specifically bequeathed (*f*) or limited in trust by the will (*g*). He may give to the mortgagee a power of sale over the mortgaged assets (*h*).

Title of alienee: when unimpeachable.

The mortgagee or purchaser from the representative has the right to infer that the representative is acting fairly in the execution of his duty, and is not bound to inquire as to the debts or legacies (*i*) or the application of the money (*k*). The property aliened cannot

(*r*) *Re Johnson, Shearman* v. *Robinson* (1880), 15 Ch. D. 548; *Re Morris* (1889), 23 L. R. Ir. 333.

(*s*) *Re Johnson, Shearman* v. *Robinson, supra.*

(*t*) *Re Frith, Newton* v. *Rolfe*, [1902] 1 Ch. 342.

(*a*) *Re Kidd, Kidd* v. *Kidd* (1894), 70 L. T. 648.

(*b*) *Re Shorey, Smith* v. *Shorey* (1898), 79 L. T. 349.

(*c*) *Re Owen, Frisby, Dyke & Co.* v. *Owen* (1892), 66 L. T. 718.

(*d*) *Nugent* v. *Gifford* (1738), 1 Atk. 463, 464. A transfer by a personal representative of his deceased's interest in a limited company is, although he is not himself a member of the company, as valid as if he had been a member (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 29). As to judgment for specific performance against a purchaser from an administrator *durante absentiâ*, see p. 199, *ante.*

(*e*) *Mead* v. *Orrery* (*Lord*) (1745), 3 Atk. 235, 240; *Scott* v. *Tyler* (1788), 2 Dick. 712, 725; *M'Leod* v. *Drummond* (1810), 17 Ves. 152, 154; *Vane* (*Earl*) v. *Rigden* (1870), 5 Ch. App. 663.

(*f*) *Ewer* v. *Corbet* (1723), 2 P. Wms. 148; *Langley* v. *Oxford* (*Earl*) (1748), Amb. 795 (Appendix C); *Andrew* v. *Wrigley* (1792), 4 Bro. C. C. 125.

(*g*) *M'Leod* v. *Drummond, supra.*

(*h*) *Russell* v. *Plaice* (1854), 18 Beav. 21; *Cruikshank* v. *Duffin* (1872), L. R. 13 Eq. 555; see, too, *Thorne* v. *Thorne*, [1893] 3 Ch. 196.

(*i*) *Watkins* v. *Cheek* (1825), 2 Sim. & St. 199, *per* LEACH, V.-C., at p. 205.

(*k*) *Corser* v. *Cartwright* (1875), L. R. 7 H. L. 731; see, too, *Keane* v. *Robarts* (1819), 4 Madd. 332, 359.

be followed into his hands by either creditor (*l*) or legatee (*m*). The title of the alienee will not be affected by the fact that a long time had elapsed between the death and the date of the alienation (*n*), nor by the fact that the alienation does not purport to be made for administrative purposes (*o*) nor to be executed by the representative in his character of representative (*p*).

When impeachable.

686. But if the nature of the transaction affords intrinsic evidence that the representative is not acting in the execution of his duty, but is committing a breach of trust (*q*), or if the mortgagee knows that there are no administrative purposes for which the money is required (*r*), he holds the property subject to the claims of creditors and beneficiaries. It rests, however, upon the person seeking to impeach the validity of the transaction to prove that the purchaser or mortgagee had notice of the true state of facts (*s*); the mere fact that an executor, who is also a devisee, includes property of his own in the security (*t*), or gives a security for an originally unsecured advance (*a*), is not sufficient to rebut the ordinary presumption that the money has been raised for administrative purposes.

Loan to executor secured on testator's estate.

So, too, the title of a person who lends money to another, not known by the lender to be, but who is in fact, an executor, for his private purposes, upon an equitable mortgage of what is really the testator's property, is postponed to the prior equity of the persons beneficially interested in the property (*b*). Fraud or collusion on the part of the lender will of course vitiate the transaction (*c*).

Administrative purposes.

687. The administrative purposes for which a representative may charge the assets include, in the case of intestacy, the payment to one of the next of kin of the value of his share in the estate (*d*).

Sale to creditor and surviving partner.

The representative may sell part of the assets to a creditor at a fixed price in discharge of his debt (*e*), and there is no objection to

(*l*) *Nugent* v. *Gifford* (1738), 1 Atk. 463; *Elliot* v. *Merriman* (1740), 2 Atk. 41.
(*m*) *Ewer* v. *Corbet* (1723), 2 P. Wms. 148; *Whale* v. *Booth* (1784), 4 Term Rep. 625, n.
(*n*) *Re Whistler* (1887), 35 Ch. D. 561; *Re Venn and Furze's Contract*, [1894] 2 Ch. 101, explaining *Re Molyneux and White* (1884), 15 L. R. Ir. 383, C. A.
(*o*) See *Colyer* v. *Finch* (1856), 5 H. L. Cas. 905, 923; *Corser* v. *Cartwright*, *supra*.
(*p*) *Re Venn and Furze's Contract*, *supra*; *Re Henson*, *Chester* v. *Henson*, [1908] 2 Ch. 356, 364.
(*q*) *Watkins* v. *Cheek* (1825), 2 Sim. & St. 199, 205; *Hill* v. *Simpson* (1802), 7 Ves. 152.
(*r*) *Ricketts* v. *Lewis* (1882), 20 Ch. D. 745; *Re Verrell's Contract*, [1903] 1 Ch. 65.
(*s*) *Corser* v. *Cartwright* (1875), L. R. 7 H. L. 731.
(*t*) *Barrow* v. *Griffith*, *Barrow* v. *Newman* (1865), 11 Jur. (N. S.) 6.
(*a*) *Miles* v. *Durnford* (1852), 2 De G. M. & G. 641, C. A.
(*b*) *Re Morgan*, *Pillgrem* v. *Pillgrem* (1881), 18 Ch. D. 93, C. A.
(*c*) *Vane* (*Earl*) v. *Rigden* (1870), 5 Ch. App. 663, 668; *Rice* v. *Gordon* (1848), 11 Beav. 265; *Scott* v. *Tyler* (1778), 2 Dick. 712, 725; *Ewer* v. *Corbet*, *supra*; *Mead* v. *Orrery* (*Lord*), (1745), 3 Atk. 235, 240; *Whale* v. *Booth*, *supra*.
(*d*) *Re O'Donnell's Estate*, [1905] 1 I. R. 406, C. A.
(*e*) *Hepworth* v. *Heslop* (1849), 6 Hare, 561; *Vane* (*Earl*) v. *Rigden*, *supra*, at p. 668.

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the representative of a partner selling the share of the deceased partner to the surviving partners (*f*).

Representative may not sell to himself.

688. Personal representatives cannot, without the sanction of the court, sell to one of themselves either directly or indirectly (*g*), though a sale may be made to one who has renounced the executorship (*h*); and a sale cannot be impeached merely on the ground that when entered upon the purchaser might have proved the will, though in fact he subsequently renounced probate (*i*).

Power over real estate vested in representative.

689. In the case of real estate which vests in the personal representatives, they have the same powers of alienation for purposes of administration as they have over the personal estate, with the exception only that to effect a sale or transfer without the sanction of the court the concurrence is required of all the personal representatives in whom the real estate is vested (*k*), whether they have proved the will or not (*l*), unless they have renounced or been cited to take probate and have not done so.

Real estate not so vested.

690. In respect of real estate which does not vest in the representatives, executors may, as has been previously pointed out (*m*), have either a common law power of sale, an implied power of sale, or a statutory power of sale or mortgage for the purpose of paying debts or legacies.

Where power of sale authorises a mortgage.

691. A power of sale out and out, and having an object beyond the raising of a particular charge, does not authorise a mortgage; but where the power is for raising a particular charge, and the estate is devised subject to that charge, it may be proper to raise the money by mortgage, and such mortgage will be supported as a conditional sale (*n*).

Power of executor-devisee to give receipt.

Where an executor is selling or mortgaging real estate devised to himself and charged with the payment of legacies only, the assignee is bound to see to the application of the purchase-money (*o*); but where the real estate is charged with payment of debts as well as of legacies the assignee is under no such obligation, even though

(*f*) *Chambers* v. *Howell* (1847), 11 Beav. 6.

(*g*) *Hall* v. *Hallet* (1784), 1 Cox, Eq. Cas. 134; *Cook* v. *Collingridge* (1823), Jac. 607; *Re Norrington, Brindley* v. *Partridge* (1879), 13 Ch. D. 654, C. A.; *Re Harvey, Harvey* v. *Lambert* (1888), 58 L. T. 449.

(*h*) *Mackintosh* v. *Barber* (1822), 1 Bing. 50.

(*i*) *Clark* v. *Clark* (1884), 9 App. Cas. 733, P. C.

(*k*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 2 (2); *Re Cohen's Executors and the London County Council*, [1902] 1 Ch. 187.

(*l*) *Re Pawley and London and Provincial Bank*, [1900] 1 Ch. 58; and as to sale of real property, generally, see title SALE OF LAND.

(*m*) See p. 236, *ante*. As to other statutory powers of sale, see titles SALE OF LAND; SETTLEMENTS.

(*n*) *Stroughill* v. *Anstey* (1852), 1 De G. M. & G. 635; *Mills* v. *Banks* (1724), 3 P. Wms. 1; *Ball* v. *Harris* (1839), 4 My. & Cr. 264, 267; *Haldenby* v. *Spofforth* (1839), 1 Beav. 390.

(*o*) *Horn* v. *Horn* (1825), 2 Sim. & St. 448; *Johnson* v. *Kennett* (1835), 3 My. & K. 624, *per* Lord LYNDHURST, L.C., at p. 630; *Re Rebbeck, Bennett* v. *Rebbeck* (1894), 42 W. R. 473.

there are, to his knowledge, no debts of the testator existing (*p*), or though the purchase-money is expressed to be raised for the payment of legacies only (*q*).

Sale by executor-legatee.

A purchase or mortgage for valuable consideration from an executor, who is also residuary legatee, of an asset of the testator by a person who has no notice of the existence of unsatisfied debts of the testator, is valid against the unsatisfied creditors, whether the assignee acquires a legal or an equitable interest in the asset (*r*). The same principle applies to the case of a specific legacy assigned by an executor who is specific legatee (*s*). But where legacies are charged upon the property bequeathed to the executor, the assignee takes the property subject to the legacies charged upon it (*a*).

Power to grant under-lease.

692. Where a term is vested in the personal representative he has power to grant an underlease, but that is an exceptional method of dealing with the assets, and those who accept a title in that way must take it subject to the question whether it was the best way of administering them (*b*); he cannot in the underlease give an option of purchasing the term (*c*).

Manner of sale.

693. Where a trust for sale or a power of sale of property is vested in the personal representative he has, in the absence of a direction to the contrary, power to sell all or any part of the property, either together or in lots, by public auction or private contract, subject to such conditions of sale as he may think fit, with power to buy in at an auction, or to vary or rescind a contract for sale, and to resell, without being answerable for any loss (*d*). The power to sell all or any part of the property would not justify a sale of either timber (*e*) or minerals (*f*) apart from the land, without the sanction of the court (*g*).

(*p*) *Johnson* v. *Kennett* (1835), 3 My. & K. 624; *Page* v. *Adam* (1841), 4 Beav. 269; *Forbes* v. *Peacock* (1846), 1 Ph. 717, 721; *Stroughill* v. *Anstey* (1852), 1 De G. M. & G. 635, at p. 653. In *Eland* v. *Eland* (1839), 4 My. & Cr. 420, the liability of the assignee to see to the payment of the legacies was not disputed.

(*q*) *Re Henson, Chester* v. *Henson*, [1908] 2 Ch. 356.

(*r*) *Graham* v. *Drummond*, [1896] 1 Ch. 968, following the principles laid down in *Nugent* v. *Gifford* (1738), 1 Atk. 463; *Mead* v. *Orrery* (*Lord*) (1745), 3 Atk. 235; *Taylor* v. *Hawkins* (1803), 8 Ves. 209; *Whale* v. *Booth* (1784), 4 Term Rep. 625, n.; *Storry* v. *Walsh* (1854), 18 Beav. 559; *Scott* v. *Tyler* (1788), 2 Dick. 712; and *M'Leod* v. *Drummond* (1807), 14 Ves. 353, 360.

(*s*) *Hall* v. *Andrews* (1872), 27 L. T. 195.

(*a*) *Bank of Bombay* v. *Suleman Somji* (1908), 99 L. T. 532, P. C., distinguishing *Graham* v. *Drummond*, *supra*.

(*b*) *Keating* v. *Keating* (1835), L. & G. *temp.* Sugd. 133; *Hackett* v. *M'Namara* (1836), L. & G. *temp.* Plunk. 283; *Oceanic Steam Navigation Co.* v. *Sutherberry* (1880), 16 Ch. D. 236, C. A.

(*c*) *Oceanic Steam Navigation Co.* v. *Sutherberry*, *supra*.

(*d*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 13. This and the following sections relating to trustees are, by s. 50 *ibid.*, rendered applicable to the case of personal representatives; see also title TRUSTS AND TRUSTEES.

(*e*) *Cholmeley* v. *Paxton* (1825), 3 Bing. 207.

(*f*) *Buckley* v. *Howell* (1861), 29 Beav. 546. This and the case cited in note (*a*), *supra*, turned upon the construction of express powers, framed in language identical with the statutory power, namely, of selling the whole or any part of the property.

(*g*) For the power of the court to sanction, see Law of Property Amendment

SECT. 2. To Alienate.

Depreciatory conditions.

694. A sale by the representative cannot be impeached by a beneficiary upon the ground that any of the conditions of sale were unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate (*h*). After execution of the conveyance, in order to impeach the sale for unnecessarily depreciatory conditions, it must be shown that the purchaser was acting in collusion with the representative at the time when the contract for sale was made (*i*).

Statutory receipt.

The personal representative has a statutory power of giving a valid discharge for money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power (*k*).

Power to insure.

695. The statutory authority (*l*) to insure conferred on the personal representative cannot be exercised where he is bound, upon request, forthwith to convey the property absolutely to a beneficiary (*m*), and is subject to any express directions given by his testator (*n*). The representative is not personally liable for omitting to insure (*o*).

SECT. 3.—*To Compromise Claims.*

Power to compromise claims.

696. The personal representative has very large powers to compromise claims (*p*). His powers extend as well to claims by legatees as to claims against the estate (*q*); the only question to be considered in the case of a compromise is whether he has acted in good faith or not. Any one of several representatives may settle an account, and the settlement is binding upon the others (*r*).

A representative has no power, without the consent of all parties interested in the estate, to compromise a question at the expense of the estate, involving the validity of the will, and consequentially his own position as executor (*s*).

Claim of co-executor.

697. It has been held that one of two executors can, in a proper case, compromise a claim of his co-executor against the estate (*t*); the position is, however, a delicate one, and the executor would do well to apply to the court for its directions (*a*). Where the

Act, 1859 (22 & 23 Vict. c. 35), s. 13; and Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 44, as amended by the Trustee Act, 1893, Amendment Act, 1894 (57 & 58 Vict. c. 10), s. 3.

(*h*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 14 (1).

(*i*) *Ibid.*, s. 14 (2).

(*k*) *Ibid.*, s. 20.

(*l*) *Ibid.*, s. 18 (1).

(*m*) *Ibid.*, s. 18 (2).

(*n*) *Ibid.*, s. 18 (3).

(*o*) *Fry* v. *Fry* (1859), 27 Beav. 144, 146.

(*p*) *Re Houghton, Hawley* v. *Blake*, [1904] 1 Ch. 622, see *per* KEKEWICH, J., at p. 625. For the statutory power, see Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 21; and see, generally, title TRUSTS AND TRUSTEES.

(*q*) *Re Warren, Weedon* v. *Reading* (1884), 32 W. R. 916, decided upon the similar language of s. 30 of stat. (1860) 23 & 24 Vict. c. 145 (now repealed).

(*r*) *Smith* v. *Everett* (1859), 27 Beav. 446, 454.

(*s*) *Graham* v. *M'Cashin*, [1901] 1 I. R. 404, 413, C. A.

(*t*) *Re Houghton, Hawley* v. *Blake*, *supra*.

(*a*) *Ibid.*, at p. 626.

compromise is shown to be injurious to the estate it will not be upheld (*b*); nor can a settlement of accounts between a body of trustees and one of their number bar the right of the beneficiaries to investigate and challenge the accounts (*c*).

SECT. 3. To Compromise Claims.

SECT. 4.—*To Pay into Court.*

Statutory right to pay into court.

698. Personal representatives have a statutory right to pay money or securities belonging to their trust into court (*d*); the receipt or certificate of the proper officer is a sufficient discharge (*e*). Where the majority are desirous of making the payment in, the court can order the payment in to be made without the concurrence of the minority, and when the money or securities are deposited with any banker, broker, or other depository, may order payment or delivery to the majority for the purpose of payment into court (*f*).

Practice in paying in.

699. Where the fund consists of money or securities representing a legacy or residue to which an infant or person beyond seas is absolutely entitled, the lodgment may be made upon a request signed by the personal representative or his solicitor, accompanied by a certificate of the Commissioners of Inland Revenue that the legacy duty has been paid, or that there is none payable; in all other cases the representative must make and file an affidavit (*g*). Where an affidavit is filed, notice of the lodgment must be given to the persons named in the affidavit as interested in the funds (*h*); but in exceptional cases notice may be dispensed with (*i*), or directed to be given by advertisement (*k*). Where the fund does not exceed £500 in value it may be paid into a county court (*l*).

When payment is justifiable.

700. Personal representatives are justified in paying a fund into court wherever there is a reasonable doubt as to the person entitled to the fund, or as to his ability to give a discharge (*m*); they ought not to do so for the mere purpose of escaping liability, when there is no reasonable doubt as to the performance of their trust (*n*), nor should they do so when the only question arising can be decided on originating summons (*o*).

(*b*) *De Cordova* v. *De Cordova* (1879), 4 App. Cas. 692, P. C.

(*c*) *Re Fish, Bennett* v. *Bennett*, [1893] 2 Ch. 413, C. A.

(*d*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 42 (1).

(*e*) *Ibid.*, s. 42 (2); and see *Re Salaman, De Pass* v. *Sonnenthal*, [1907] 2 Ch. 46.

(*f*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 42 (3).

(*g*) R. S. C., Ord. 54B, r. 4 (prescribing the contents of the affidavit); Supreme Court Funds Rules, 1905, r. 41; see also Yearly Practice of the Supreme Court, 1911, p. 781.

(*h*) R. S. C., Ord. 54B, r. 4 (2) (a).

(*i*) *Re Hansford* (1859), 7 W. R. 199, 254; *Re Whitaker* (1882), 47 L. T. 507.

(*k*) *Re Goodsman's Will*, [1870] W. N. 152; *Re Hardley's Trusts* (1879), 10 Ch. D. 664, C. A.

(*l*) County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 67 (5), 70. For manner of paying into a county court, see County Court Rules, 1903, Ord. 38, rr. 9 *et seq.*; and title COUNTY COURTS, Vol. VIII., pp. 497 *et seq.*

(*m*) *Re Parker's Will Trusts* (1888), 58 L. J. (CH.) 23, C. A., *per* FRY, L.J., at p. 25.

(*n*) *Re Elliot's Trusts* (1873), L. R. 15 Eq. 194.

(*o*) *Re Giles* (1886), 55 L. J. (CH.) 695. As to originating summons, generally, see title PRACTICE AND PROCEDURE.

SECT. 4. To Pay into Court.

A personal representative who pays a fund into court loses any discretionary powers he may have with regard to the application of the fund (*p*).

Costs.

701. Where the lodgment is made upon a request unaccompanied by an affidavit, the personal representative is not entitled to deduct from the amount paid in the cost of paying it in (*q*). In other cases he may deduct the reasonable costs of the payment into court where no dispute has arisen, or is likely to arise, as to the deduction (*r*); but the better course is for him to pay in the whole fund, leaving it for the court to settle the amount of costs to which he is entitled upon the application for payment out (*s*). The jurisdiction of the court on applications relating to the fund is limited to the fund actually paid into court, and does not extend to sums which have been deducted before payment in; if the beneficiaries desire to question the deductions, they must bring a separate action (*t*).

Funds in court cannot be garnisheed.

702. A judgment creditor of a creditor of the deceased cannot obtain a garnishee order against funds paid into court by the deceased's representatives (*a*).

SECT. 5.—*To Appropriate.*

In case of vested legacies immediately payable.

703. An appropriation in the strict sense of the word by an executor of a specific portion of the assets to answer a vested absolute legacy can only be made with the consent of a legatee who is *sui juris* (*b*). Where a share of residue is immediately payable it is competent for the executor to enter into an arrangement with the legatee to take over a particular asset in satisfaction of his legacy either in whole or *pro tanto*, without obtaining the consent of the other residuary legatees: and if the transaction is a fair one, and the legatee does not receive more than his share of the assets, the appropriation is unimpeachable (*c*). The appropriation may be made in favour of a legatee who is also an executor (*d*).

Vested legacies payable *in futuro*.

704. Where a legacy is presently vested, but payable in future, the legatee has an absolute right to require the amount of the legacy

(*p*) *Re Murphy's Trusts*, [1900] 1 I. R. 145, following *Re Williams' Settlement* (1858), 4 K. & J. 87; *Re Coe's Trusts* (1858), 4 K. & J. 199, and dissenting from *Re Landon's Trusts* (1871), 40 L. J. (CH.) 370.

(*q*) See footnote to Form No. 16 in Appendix to Supreme Court Funds Rules, 1905.

(*r*) *Beaty* v. *Carson* (1868), L. R. 7 Eq. 194. In the case of payment into a county court, a bill of costs may be filed, and the amount allowed on taxation of the bill may be deducted (County Court Rules, 1903, Ord. 38, r. 11).

(*s*) *Re Parker's Will Trusts* (1888), 58 L. J. (CH.) 23, C. A., *per* FRY, L.J., at p. 25.

(*t*) *Re Bloye's Trusts* (1849), 1 Mac. & G. 488, 504; *Re Barber's Will* (1849), 32 L. J. (CH.) 709; *Re Parker's Will Trusts*, *supra*.

(*a*) *Stevens* v. *Phelips* (1875), 10 Ch. App. 417. For garnishee orders generally, see title EXECUTION, pp. 90 *et seq.*, *ante*.

(*b*) *Re Salaman, De Pass* v. *Sonnenthal*, [1907] 2 Ch. 46.

(*c*) *Re Lepine, Dowsett* v. *Culver*, [1892] 1 Ch. 210, C. A.

(*d*) *Re Richardson, Morgan* v. *Richardson*, [1896] 1 Ch. 512.

to be invested by the executor; where that is done it would amount to an appropriation in the strict sense of the word (*e*).

Contingent legacies.

705. Where a legacy is contingent, and by the will part of the income arising from the legacy is to go to the legatee before the happening of the contingency, it may be properly inferred that the testator intended a fund to be set apart and invested to answer the legacy: the executor has, in such a case, power to set apart and invest a sum of money to carry out his testator's intentions (*f*). But where no interest is directed to be paid on it in the meantime, the executor has no power to appropriate a fund to satisfy the legacy (*g*), nor can the legatee require such an appropriation to be made (*h*). The executor may, however, set aside a sum amply sufficient to answer the legacy, invest it, and then proceed to distribute the residue without rendering himself personally liable to make good the loss, if it should subsequently turn out that the sum so retained was not sufficient to answer the legacy (*i*).

Settled legacies.

706. Executors who are also trustees of settled shares of residue may appropriate specific assets, provided they are investments of an authorised nature, to the settled shares (*k*): they may appropriate to one share without making a corresponding appropriation to the other shares (*l*).

Extent of power.

The power of appropriation extends to pure personalty of whatever nature (*m*), to chattels real (*n*), and, it is conceived, to real estate where there is a trust for sale and conversion (*o*).

Effect of appropriation.

707. Where an appropriation in the strict sense of the word has been made, all profit or loss, as the case may be, in respect of the appropriated fund goes to or falls upon the legatee (*p*). An assignment of specific assets in satisfaction of a pecuniary legacy is liable to be stamped as a conveyance on sale (*q*).

(*e*) *Re Hall, Foster* v. *Metcalfe*, [1903] 2 Ch. 226, 231, C. A.; see, too, *Phipps* v. *Annesley* (1740), 2 Atk. 57; *Johnson* v. *Mills* (1749), 1 Ves. Sen. 282.

(*f*) *Re Hall, Foster* v. *Metcalfe*, *supra*, at p. 233; see, too, *Green* v. *Pigot* (1781), 1 Bro. C. C. 103.

(*g*) *Re Hall, Foster* v. *Metcalfe*, *supra*, at p. 233.

(*h*) *Ibid.*, at p. 235; see, too, *Webber* v. *Webber* (1823), 1 Sim. & St. 311; *King* v. *Malcott* (1852), 9 Hare, 692, 696.

(*i*) *Re Hall, Foster* v. *Metcalfe*, *supra*, at p. 233.

(*k*) *Re Waters, Preston* v. *Waters*, [1889] W. N. 39; *Re Richardson, Morgan* v. *Richardson*, [1896] 1 Ch. 512.

(*l*) *Re Nickels, Nickels* v. *Nickels*, [1898] 1 Ch. 630.

(*m*) See *Elliott* v. *Kemp* (1840), 7 M. & W. 306 (furniture); *Barclay* v. *Owen* (1889), 60 L. T. 220; *Re Lepine, Dowsett* v. *Culver*, [1892] 1 Ch. 210, C. A. (mortgage debt); *Re Richardson, Morgan* v. *Richardson, supra; Re Brooks, Coles* v. *Davis* (1897), 76 L. T. 771 (shares in a brewery company); *Re Nickels, Nickels* v. *Nickels, supra* (stock); *Re Waters, Preston* v. *Waters, supra* (mortgages and other securities).

(*n*) *Re Beverly, Watson* v. *Watson*, [1901] 1 Ch. 681.

(*o*) *Ibid.*, at p. 686.

(*p*) *Burgess* v. *Robinson* (1817), 3 Mer. 7, 9; *Rock* v. *Hardman* (1819), 4 Madd. 253; *Kimberly* v. *Tew* (1843), 4 Dr. & War. 139, 149; *Re Hall, Foster* v. *Metcalfe, supra.*

(*q*) *Dawson* v. *Inland Revenue Commissioners*, [1905] 2 I. R. 69. For stamps on a conveyance for sale, see Stamp Act, 1891 (54 & 55 Vict. c. 39); Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8); and, generally, titles REVENUE; SALE OF LAND.

SECT. 5. **To Appropriate.**

Statutory power.

708. Personal representatives have also a statutory power (*r*), in the absence of a direction to the contrary contained in the will, with the consent of the legatee, to appropriate, in accordance with "prescribed provisions," any part of the residuary estate, real or personal (*s*), in satisfaction of a legacy or share of residue. No provisions have yet been prescribed, and the statutory power accordingly remains ineffective at present; the Act contains nothing, however, to affect the power of the personal representatives to appropriate specific assets vested in them, where the will contains a trust for sale and conversion (*t*).

SECT. 6.—*Survivorship of Powers.*

Statutory survivorship.

709. In the case of wills which have come into operation since the 31st December, 1881, there is statutory provision, in the absence of a contrary direction, for the survivorship of powers and trusts given to or vested in two or more trustees jointly (*a*).

Whether powers personal or annexed to office.

The question whether a power is intended to be personal to the individuals to whom it is given, or whether it is intended to be annexed to their office, is one of construction.

The presumption is that every power given to trustees which enables them to deal with or affect the trust property is *primâ facie* given to them *ex officio* as an incident of their office, and passes with the office to the holders or holder thereof for the time being; the mere fact that the power is one requiring the exercise of a very wide personal discretion is not enough to exclude the *primâ facie* presumption. The testator's reliance on the individuals to the exclusion of the holders of the office must be expressed in clear and apt language (*b*). The fact that the power is expressed to be given to my executors "herein named" is not sufficient to indicate that there is a confidence reposed in the individuals apart from their official capacity (*c*). Where the power is annexed to the office, an executor who renounces probate is incapable of exercising it (*d*).

(*r*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 4 (1).

(*s*) *Re Beverly, Watson* v. *Watson*, [1901] 1 Ch. 681.

(*t*) *Re Beverly, Watson* v. *Watson, supra*, at p. 687.

(*a*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 22. This section is rendered applicable to the case of executors by s. 50 of the Act; see also title TRUSTS AND TRUSTEES.

(*b*) *Re Smith, Eastick* v. *Smith*, [1904] 1 Ch. 139, *per* FARWELL, J., at p. 144, commenting upon the *dictum* of Sir W. GRANT, M.R., in *Cole* v. *Wade* (1807), 16 Ves. 27, at p. 44, "that wherever the power is of a kind that indicates a personal confidence, it must *primâ facie* be understood to be confined to the individual to whom it is given; and will not, except by express words, pass to others, to whom by legal transmission the same character may happen to belong."

(*c*) *Crawford* v. *Forshaw*, [1891] 2 Ch. 261, C. A.; see, too, *Re Bacon, Toovey* v. *Turner*, [1907] 1 Ch. 475.

(*d*) *Crawford* v. *Forshaw, supra*; see, too, *Keates* v. *Burton* (1808), 14 Ves. 434; *A.-G.* v. *Fletcher* (1835), 5 L. J. (CH.) 75.

Part VI.—Liabilities of the Representative.

SECT. 1.—*In respect of the Contracts and Torts of the Deceased.*

SECT. 1. In respect of the Contracts and Torts of the Deceased.

SUB-SECT. 1.—*Contractual Obligations.*

General rule.

710. All claims founded upon any obligation under a contract, bond, or covenant, or upon any debt or duty which might have been enforced by suing the deceased in his lifetime, are in like manner enforceable, to the extent of assets, against the personal representative (*e*), though he be not named in the instrument creating the obligation (*f*).

Where contract founded on personal considerations.

711. Where, however, a contract is founded on personal considerations, the death of either party puts an end to the relationship (*g*): thus an agreement between master and servant is determined by the death of either party; an agreement to write a book or to paint a picture is determined by the death of the author or the artist (*h*). On the death of a master no portion of the premium can be recovered by an apprentice (*i*), and a similar rule holds in the case of a solicitor to whom a clerk has been articled (*k*). But the representatives are entitled to sue for any money actually earned by the deceased during his lifetime (*l*), and even for remuneration accruing due after his death, if it appears to have been the intention of the parties that remuneration should continue payable after the termination of the contract (*m*).

Statutory obligations.

Similarly a statutory obligation which is purely personal, and for the enforcement of which a statutory mode is provided, as, for instance, the liability of the putative father under a bastardy order, ceases when, by the person's death, the statutory mode of enforcing payment has ceased, and no claim can be maintained against his representatives either for arrears or for future payments (*n*).

In the case of breach of promise of marriage, an action cannot be maintained against the representative of the promisor in the

(*e*) Bac. Abr., tit. Executors and Administrators (P), 1; Shep. Touch. (ed. Preston), p. 482; *Hambly* v. *Trott* (1776), 1 Cowp. 371, 375; *Hyde* v. *Skinner* (1723), 2 P. Wms. 197.

(*f*) Went. Off. Ex., 14th ed., 239, 243.

(*g*) *Farrow* v. *Wilson* (1869), L. R. 4 C. P. 744; see title CONTRACT, Vol. VII., p. 502; see also p. 225, *ante*. As to claims in respect of workmen's compensation, see title MASTER AND SERVANT.

(*h*) *Hall* v. *Wright* (1859), E. B. & E. 765, Ex. Ch., *per* POLLOCK, C.B., at p. 794; *Siboni* v. *Kirkman* (1836), 1 M. & W. 418, 423.

(*i*) *Whincup* v. *Hughes* (1871), L. R. 6 C. P. 78; see also title MASTER AND SERVANT.

(*k*) *Ferns* v. *Carr* (1885), 28 Ch. D. 409, dissenting from *Hirst* v. *Tolson* (1850), 2 Mac. & G. 134.

(*l*) *Stubbs* v. *Holywell Rail. Co.* (1867), L. R. 2 Exch. 311. As to liabilities of representative in case of building contracts and the like, see title BUILDING CONTRACTS, ENGINEERS AND ARCHITECTS, Vol. III., pp. 273, 294.

(*m*) *Wilson* v. *Harper*, [1908] 2 Ch. 370; and see title CONTRACT, Vol. VII., p. 502.

(*n*) *Re Harrington, Wilder* v. *Turner*, [1908] 2 Ch. 687.

SECT. 1. In respect of the Contracts and Torts of the Deceased.

absence of special damage to the property of the promisee (*o*); the special damage must be of a nature to bring it within the ordinary rules as to remoteness of damage (*p*).

Agreement to give legacy for work done.

712. A man who does work for a testator on the understanding that he is to be remunerated by a legacy has no claim against his estate, if the testator fails to provide for the legacy (*q*), and the executors are not entitled to satisfy such a claim (*r*). It rests, however, upon the executors to show that the work was done upon such an understanding; the mere forbearance to send in a claim for work done in the expectation of a legacy is no bar to a claim against the executors for the services rendered if the party is disappointed in his expectation (*s*).

Representative of original lessee.

713. The representative of an original lessee is liable in his representative capacity, to the extent of assets, upon the covenants contained in the lease for the residue of the term, whether the term was assigned by the lessee in his lifetime (*t*) or by the representative after his death (*a*). Upon a sale, however, he has the benefit of a statutory protection (*b*).

Representative of assignee of a term.

Where the deceased was an assignee of the term, his estate remains liable upon the covenants so long as the term is vested in his personal representative. Where the lease is an onerous one, it is accordingly the duty of the representative, as he cannot disclaim it (*c*), to offer to surrender it to the lessor, and, in the event of his refusal to accept a surrender, to find an assignee, even though he be a pauper (*d*).

Where representative has entered on deceased's leaseholds.

714. Where the representative has entered upon the deceased's leaseholds, the lessor has the option to sue him either in his representative capacity or in his personal capacity as assignee of the lease; and in the latter case judgment goes against him *de bonis propriis*. He can only be sued in his personal capacity where he has entered (*e*): the entry by one of several representatives does not

(*o*) *Finlay* v. *Chirney* (1888), 20 Q. B. D. 494, C. A.

(*p*) *Ibid.*, *per* BOWEN, L.J., at p. 507. For measure of damages, see title DAMAGES, Vol. X., p. 323.

(*q*) *Osborn* v. *Guy's Hospital* (*Governors*) (1726), 2 Stra. 728; *Le Sage* v. *Coussmaker* (1794), 1 Esp. 187; *Maddison* v. *Alderson* (1883), 8 App. Cas. 467.

(*r*) *Shallcross* v. *Wright* (1850), 12 Beav. 558.

(*s*) *Baxter* v. *Gray* (1842), 3 Man. & G. 771.

(*t*) *Brett* v. *Cumberland* (1619), Cro. Jac. 521; *Coghil* v. *Freelove* (1690), 3 Mod. Rep. 325.

(*a*) *Helier* v. *Casebert* (1664), 1 Lev. 127; *Pitcher* v. *Tovey* (1691), 4 Mod. Rep. 71, 76.

(*b*) Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 27; see p. 255, *ante*, and, generally, titles LANDLORD AND TENANT; SALE OF LAND.

(*c*) See *Rubery* v. *Stevens* (1832), 4 B. & Ad. 241.

(*d*) *Reid* v. *Tenterden* (*Lord*) (1833), 4 Tyr. 111; *Rowley* v. *Adams* (1839), 4 My. & Cr. 534. For the right of an assignee to assign over to a pauper, see *Taylor* v. *Shum* (1797), 1 Bos. & P. 21; *Onslow* v. *Corrie* (1817), 2 Madd. 330.

(*e*) *Wollaston* v. *Hakewill* (1841), 3 Man. & G. 297; *Rendall* v. *Andreæ* (1892), 61 L. J. (Q. B.) 630. An executor *de son tort* can be so sued (*Fielding* v. *Cronin* (1885), 16 L. R. Ir. 379, C. A.).

render his co-representatives liable to an action for use and occupation (*f*).

If the representative is sued as assignee of the lease for the rent accrued during the time in which he was in possession, he is entitled to set up by way of defence that he is only assignee as personal representative, and that the profits or yearly value of the property amount to a sum less than the rent (*g*). In such case the personal liability of the representative is limited to the profits or yearly value of the property: it is not confined to the actual profits he may have received, but extends to the profits which he might have received if he had used due diligence (*h*). The representative cannot limit his personal liability where an action is brought against him as assignee of the lease for breach of a covenant to repair (*i*).

Limitation of personal liability.

715. Where the lessee dies before the expiration of the term, and his representative continues in possession for the remainder, a distress may be taken for rent due for any part of the term, including arrears accrued due during the lifetime of the lessee (*k*).

Remedy by distress.

716. Specific performance may be ordered against the personal representative of a person who has agreed to accept a lease (*l*); but the lease must be so framed as not to impose a personal liability upon the representative (*m*).

Specific performance of agreement for a lease.

717. The estate of a deceased member of a company incorporated under the Companies Acts remains subject to the burdens of membership (*n*), and his personal representatives, heirs, and devisees are liable in due course of administration to contribute to the assets of the company in discharge of his liability: if the personal representatives make default in paying any money ordered to be paid by them, proceedings may be taken for administering the personal and real estates of the deceased contributory, and of compelling payment thereout of the money due (*o*). The money due is in the nature of a specialty debt (*p*). Personal representatives who

Shareholders in companies.

Provision for future calls.

(*f*) *Nation* v. *Tozer* (1834), 1 Cr. M. & R. 172.

(*g*) *Re Bowes, Strathmore (Earl)* v. *Vane, Norcliffe's Claim* (1887), 37 Ch. D. 128, 133; *Billinghurst* v. *Spearman* (1695), 1 Salk. 297; *Buckley* v. *Pirk* (1710), 1 Salk. 316.

(*h*) *Re Bowes, Strathmore (Earl)* v. *Vane, Norcliffe's Claim, supra; Whitehead* v. *Palmer*, [1908] 1 K. B. 151; *Rubery* v. *Stevens* (1832), 4 B. & Ad. 241; *Hopwood* v. *Whaley* (1848), 6 C. B. 744. *Remnant* v. *Bremridge* (1818), 8 Taunt. 191, is not good law.

(*i*) *Tremeere* v. *Morison* (1834), 1 Bing. (N. C.) 89; *Sleap* v. *Newman* (1862), 12 C. B. (N. S.) 116; *Rendall* v. *Andreæ* (1892), 61 L. J. (Q. B.) 630.

(*k*) Went. Off. Ex., 14th ed. at p. 291; *Braithwaite* v. *Cooksey* (1790), 1 Hy. Bl. 465; see title DISTRESS, Vol. XI., p. 150.

(*l*) *Phillips* v. *Everard* (1831), 5 Sim. 102.

(*m*) *Stephens* v. *Hotham* (1855), 1 K. & J. 571.

(*n*) *Baird's Case* (1870), 5 Ch. App. 725, 735; *James* v. *Buena Ventura Nitrate Grounds Syndicate, Ltd.*, [1896] 1 Ch. 456, 465, C. A.; and see title COMPANIES, Vol. V., p. 490.

(*o*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 126.

(*p*) *Ibid.*, s. 14. For the liability of the estate of a member of a banking company formed under the County Bankers Act, 1826 (7 Geo. 4, c. 46), see *Barker* v. *Buttress* (1843), 7 Beav. 134; *Heward* v. *Wheatley* (1852), 5 De G. & Sm. 552; *Re Walton's Estate* (1857), 23 Beav. 480.

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distribute the estate amongst the beneficiaries without providing for the liability attaching to the estate in respect of shares not fully paid up, forming part of the estate, commit a *devastavit*, and are personally liable to pay calls on the shares up to the amount of the assets distributed (*q*).

Personal liability of representative.

Where a personal representative has had the shares transferred into his own name, he becomes to all intents and purposes a member of the company, with the consequential liabilities of membership (*r*); and the same principle applies in the case of any further shares he accepts to which the estate he represents is entitled (*s*). But the mere production of his grant of administration for the purpose of having it recorded in the company's books does not render him personally liable as a shareholder, whatever entries may have been made in the books (*t*), nor does the receipt of dividends by him of itself amount to a personal acceptance of the shares (*a*).

Right of representatives to have names entered on company's register.

Personal representatives are entitled to have their names entered on the company's register without any statement that they hold the shares in a representative capacity, and to have them inserted in such order as they please (*b*). They may, if they choose, execute a valid transfer without ever having been registered as members (*c*).

Joint contractors.

718. The obligation upon a joint contract devolves upon the survivors, and the estate of a deceased joint contractor is under no primary liability (*d*).

The question whether a particular promise is joint or several, or both joint and several, is one of construction (*e*). A bond, though joint in form, and though it would be construed as creating a joint obligation only at law, may in equity, in the administration of the estate of a deceased obligor, be construed as joint and several, especially in the case of a bond given by partners, or in substitution for an antecedent joint and several liability (*f*).

(*q*) *Taylor* v. *Taylor* (1870), L. R. 10 Eq. 477.

(*r*) *Buchan's Case* (1879), 4 App. Cas. 547, 549; *Duff's Executors' Case* (1886), 32 Ch. D. 301, C. A.

(*s*) *Fearnside and Dean's Case, Dobson's Case* (1866), 1 Ch. App. 231.

(*t*) *Buchan's Case, supra*, at p. 594.

(*a*) See *Re St. George's Steam Packet Co., Ex parte Doyle* (1850), 2 H. & Tw. 221; *Hamer's Devisees' Case* (1852), 2 De G. M. & G. 366; *Re Herefordshire Banking Co., Bulmer's Case* (1864), 33 Beav. 435; *Buchan's Case, supra*.

(*b*) *Re Saunders (T. H.) & Co., Ltd.*, [1908] 1 Ch. 415.

(*c*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 29. For service of notices where the representative has not been registered as a member, see *New Zealand Gold Extraction Co. (Newbury-Vautin Process)* v. *Peacock*, [1894] 1 Q. B. 622, C. A.; *Allen* v. *Gold Reefs of West Africa, Ltd.*, [1900] 1 Ch. 656, C. A.; and title COMPANIES, Vol. V., p. 196.

(*d*) *Richards* v. *Heather* (1817), 1 B. & Ald. 29; *White* v. *Tyndall* (1888), 13 App. Cas. 263; *Clarke* v. *Bickers* (1845), 14 Sim. 639; *Calder* v. *Rutherford* (1822), 3 Brod. & Bing. 302; *Ashbee* v. *Pidduck* (1836), 1 M. & W. 564; *Maxwell's Case, Hill's Case* (1875), L. R. 20 Eq. 585, 595, 598. The executor of a deceased joint contractor cannot, therefore, either by payment of interest (*Slater* v. *Lawson* (1830), 1 B. & Ad. 396) or by acknowledgment (*Read* v. *Price*, [1909] 1 K. B. 577), take the debt out of the Statutes of Limitation as against his co-contractors.

(*e*) For rules as to construction, see title CONTRACT, Vol. VII., p. 338.

(*f*) *Beresford* v. *Browning* (1875), 1 Ch. D. 30, C. A.; *Lane* v. *Williams* (1693),

As between the co-contractors, where the joint contract is for the benefit of all, there is an implied condition that each will contribute an aliquot part to the contractor who pays the debt, and an action for contribution will lie against the personal representative of a deceased co-contractor (*g*). But it cannot be stated as a universal proposition that in all cases where two or more jointly employ a third person there is an implied condition in all to contribute rateably *inter se*, so as to bind the personal representative of a deceased co-contractor; each case must stand on its own ground (*h*).

Liability of estate of deceased partner for partnership debts.

719. The separate estate of a deceased partner is liable both jointly and severally in due course of administration for the partnership debts and obligations, subject, however, to the prior payment of his separate debts (*i*). The partnership creditor is entitled to prove in the administration of the deceased partner's estate after the separate debts are paid, without first proving that the surviving partner is insolvent, and without being obliged first to have recourse to the joint assets (*k*); but it is necessary that the surviving partner should be present at the taking of the accounts of the deceased partner's estate (*l*). Where there are no partnership assets, the joint creditors come in *pari passu* with the separate creditors (*m*).

When liability discharged.

The estate of the deceased partner may be discharged by direct payments, or by dealings of the creditor with the continuing partners operating as payment of the joint debt (*n*). It may also be discharged by the acceptance by the creditor of the security of the continuing partners in lieu of the original partnership liability (*o*), or by novation of the original contract with the continuing partners (*p*). But the circumstance that the creditor continues his transactions with the survivors, and, at their request, forbears for some years to enforce payment (*q*), or receives interest on his debt

2 Vern. 292; *Devaynes* v. *Noble, Baring* v. *Noble* (1816), 1 Mer. 530; *Primrose* v. *Bromley* (1739), 1 Atk. 89; *Levy* v. *Sale* (1877), 37 L. T. 709; *Sumner* v. *Powell* (1816), 2 Mer. 30; *Richardson* v. *Horton* (1843), 6 Beav. 185; see, generally, title BONDS, Vol. III., p. 79.

(*g*) *Ashby* v. *Ashby* (1827), 7 B. & C. 444; *Batard* v. *Hawes* (1853), 2 E. & B. 287. For right of contribution generally, see titles CONTRACT, Vol. VII., p. 472; EQUITY, Vol. XIII., p. 30; and, generally, title GUARANTEE.

(*h*) *Prior* v. *Hembrow* (1841), 8 M. &. W. 873, *per* ALDERSON, B., at p. 889.

(*i*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 9. The Act has not enlarged the liabilities for which, prior to the Act, the estate of a deceased partner was responsible (*Friend* v. *Young*, [1897] 2 Ch. 421).

(*k*) *Wilkinson* v. *Henderson* (1833), 1 My. & K. 582; *Re Hodgson, Beckett* v. *Ramsdale* (1885), 31 Ch. D. 177, C. A.; *Re Doetsch, Matheson* v. *Ludwig*, [1896] 2 Ch. 836, 839, in which case it was held that this rule of procedure applied to the case of a foreign firm having a place of business here, one of the partners domiciled in England dying and leaving assets in England, notwithstanding that the law of the foreign country differed from that of England.

(*l*) *Re Hodgson, Beckett* v. *Ramsdale, supra.*

(*m*) See title BANKRUPTCY, Vol. II., p. 219.

(*n*) *Winter* v. *Innes* (1838), 4 My. & Cr. 101, 110.

(*o*) *Thompson* v. *Percival* (1834), 5 B. & Ad. 925.

(*p*) *Re Head, Head* v. *Head* (No. 2), [1894] 2 Ch. 236, C. A., distinguishing *Re Head, Head* v. *Head*, [1893] 3 Ch. 426; *Bilborough* v. *Holmes* (1876), 5 Ch. D. 255.

(*q*) *Winter* v. *Innes, supra.*

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from the surviving partners (*r*), or obtains judgment against them (*s*), is not of itself sufficient to discharge the estate of the deceased partner.

Wrongful acts of co-partner.

720. In cases in which the firm becomes liable for the wrongful acts or omissions of a partner, or for the misapplication of money or property of a third person, every partner is liable both jointly and severally (*t*); in such cases the liability of a deceased partner devolves upon his representatives. Where the wrongful act is committed after the death of a partner, no liability is imposed upon his estate (*a*).

No liability for subsequent debts.

The estate of a deceased partner is not liable for debts of his late firm contracted after his death (*b*); nor does the continued use of the old firm-name, or of the deceased partner's name as part thereof, of itself impose liability upon his representative or estate (*c*).

Guarantors.

721. Where the consideration for a guarantee is given once for all, as in the case of the guarantee of the integrity of a servant or agent taken into a person's employment, the guarantee cannot, in the absence of a stipulation to the contrary, be determined by notice, and the liability in respect thereof does not cease upon the death of the guarantor (*d*). But where the consideration is fragmentary and supplied from time to time, as in the case of the guarantee of a running account with a banker, the general rule is that the guarantee is determined by notice of the guarantor's death (*e*), though not by the mere fact of his death (*f*). Should, however, the contract of guaranty require a special notice of determination to be given, the personal representative must comply with the requirement in order to put an end to the guarantee (*g*), unless the creditor proceeds upon the footing that the guarantee is at an end (*h*).

SUB-SECT. 2.—*Implied Obligations.*

Duty arising from relationship of parties.

722. It is not only where there is an express contract that an action grounded on some default of the person whose representative is sued can be maintained; if the position of the parties is such that the law would imply a contract from that position,

(*r*) *Harris* v. *Farwell* (1846), 13 Beav. 403.
(*s*) *Jacomb* v. *Harwood* (1751), 2 Ves. Sen. 265; *Re Hodgson, Beckett* v. *Ramsdale* (1885), 31 Ch. D. 177, C. A.
(*t*) Partnership Act, 1890 (53 & 54 Vict. c. 39), ss. 10, 11, 12; *Erlanger* v. *New Sombrero Phospate Co.* (1878), 3 App. Cas. 1218.
(*a*) *Devaynes* v. *Noble, Baring* v. *Noble, Houlton's Case* (1816), 1 Mer. 530, 616; *Friend* v. *Young*, [1897] 2 Ch. 421.
(*b*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 36 (3).
(*c*) *Ibid.*, s. 14 (2). For the law as to the liability of a person who holds himself out as a partner, see title PARTNERSHIP.
(*d*) *Calvert* v. *Gordon* (1828), 3 Man. & Ry. (K. B.) 124; *Lloyd's* v. *Harper* (1880), 16 Ch. D. 290, C. A.; *Re Crace, Balfour* v. *Crace*, [1902] 1 Ch. 733.
(*e*) *Coulthart* v. *Clementson* (1879), 5 Q. B. D. 42; *Re Whelan, Dod* v. *Whelan*, [1897] 1 I. R. 575.
(*f*) *Bradbury* v. *Morgan* (1862), 1 H. & C. 249.
(*g*) *Re Silvester, Midland Rail. Co.* v. *Silvester*, [1895] 1 Ch. 573.
(*h*) *Harriss* v. *Fawcett* (1873), 8 Ch. App. 866; see generally, as to the liabilities of a guarantor, title GUARANTEE.

then the representative may still be held liable (*i*). There are many cases where an action can be brought upon an obligation implied by law in consequence of the position which the parties have undertaken one to another (*k*). Familiar instances are those of common carriers and bailees (*l*). The relation of solicitor and client (*m*), the common law liability of the representatives of a deceased incumbent for dilapidations (*n*), and the customary obligations of copyholders (*o*) are other examples.

Examples.

723. Although the estate of a legal tenant for life of freeholds is not liable at common law for waste, permissive or voluntary (*p*), yet where there is an express direction in the instrument creating the settlement that the property is to be kept in repair, failure to comply with that obligation raises in equity a liability against the estate of the deceased tenant for life (*q*).

Settled freeholds.

The estate of a tenant for life is liable to make good to the persons entitled under the settlement any damages occasioned by his default in complying with his statutory obligations to maintain and insure improvements (*r*).

Statutory liability of estate of tenant for life.

724. Where leasehold property is settled by will the tenant for life, whether legal or equitable, is bound as between himself and the estate of the testator to perform the covenants and indemnify the estate (*a*), though he is not liable for repairs necessary at the commencement of his interest, or in respect of breaches of covenant

Settled leaseholds.

(*i*) *Batthyany* v. *Walford* (1887), 36 Ch. D. 269, C. A., *per* COTTON, L.J., at p. 279.

(*k*) *Ibid.*

(*l*) *Morgan* v. *Ravey* (1861), 6 H. & N. 265; see, *e.g.*, titles BAILMENT, Vol. I., p. 524; CARRIERS, Vol. IV., p. 4.

(*m*) *Wilson* v. *Tucker* (1822), 3 Stark. 154; *Blyth* v. *Fladgate*, *Morgan* v. *Blyth*, *Smith* v. *Blyth*, [1891] 1 Ch. 337; *Davies* v. *Hood* (1903), 88 L. T. 19.

(*n*) *Sollers* v. *Lawrence* (1743), Willes, 413, 421; *Mason* v. *Lambert* (1848), 12 Q. B. 795, 799. The liability of the representatives is now regulated by statute; see Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), ss. 34, 36. Where an order has been made under the Act the costs of repairs constitute a debt payable to the new incumbent out of the assets of the late incumbent *pari passu* with the debts of his other creditors (*Re Monk*, *Wayman* v. *Monk* (1887), 35 Ch. D. 583); see, generally, title ECCLESIASTICAL LAW, Vol. XI., p. 768.

(*o*) See title COPYHOLDS, Vol. VIII., p. 48.

(*p*) *Phillips* v. *Homfray* (1883), 24 Ch. D. 439, C. A., *per* BOWEN, L.J., at p. 455; *Re Cartwright*, *Avis* v. *Newman* (1889), 41 Ch. D. 532, following *Gibson* v. *Wells* (1805), 1 Bos. & P. (N. R.) 290; *Herne* v. *Bembow* (1813), 4 Taunt. 764; *Powys* v. *Blagrave* (1854), 4 De G. M. & G. 448, and explaining *dicta* in *Yellowly* v. *Gower* (1855), 11 Exch. 274, and *Woodhouse* v. *Walker* (1880), 5 Q. B. D. 404, 407.

(*q*) *Re Williames*, *Andrew* v. *Williames* (1885), 54 L. T. 105, C. A.; see, too, *Messenger* v. *Andrews* (1828), 4 Russ. 478; *Gregg* v. *Coates*, *Hodgson* v. *Coates* (1856), 23 Beav. 33. The equitable liability for permissive waste is confined to cases where there is an obligation to keep in repair (*Re Cartwright*, *Avis* v. *Newman*, *supra*).

(*r*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 28; see, generally, title SETTLEMENTS.

(*a*) *Kingham* v. *Kingham*, [1897] 1 I. R. 170; *Re Betty*, *Betty* v. *A.-G.*, [1899] 1 Ch. 821, dissenting from *Re Baring*, *Jeune* v. *Baring*, [1893] 1 Ch. 61, and *Re Tomlinson*, *Tomlinson* v. *Andrew*, [1898] 1 Ch. 232; *Re Gjers*, *Cooper* v. *Gjers*, [1899] 2 Ch. 54; see, too, *Re Redding*, *Thompson* v. *Redding*, [1897] 1 Ch. 876.

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which had arisen before the testator's death (*b*). But although as between himself and the testator's estate the tenant for life may be under an obligation to indemnify the estate, that obligation cannot be enforced by the remainderman after the death of the tenant for life against the estate of the latter (*c*).

Breach of trust.

725. The liability of a trustee for a breach of trust survives against his personal representatives (*d*), whether the loss be occasioned by default on his part or by his act (*e*), and although the consequences do not occur until after his death (*f*). The liability of the representative originates from and depends entirely on the liability of the deceased, so that the representative cannot rely upon any Statute of Limitation in answer to the claim which the deceased himself could not have set up (*g*). An action for breach of trust may be brought against the surviving trustees without joining the representatives of a deceased trustee (*h*); where the action is brought against the representatives of the last surviving trustee, new trustees must be appointed, so that the trust estate may be represented before the court (*i*).

SUB-SECT. 3.—*Torts.*

Actio personalis moritur cum personâ.

726. The general rule is that the representative cannot be sued for a wrong committed by the deceased for which unliquidated damages only would be recoverable (*k*); the rule is expressed in the maxim *actio personalis moritur cum personâ*, and the principle is applicable both at law and in equity (*l*). Thus an action for deceit will not lie against the representatives of a person who has fraudulently induced another to take shares in a company (*m*), or even to purchase shares from the deceased himself (*n*).

Exceptions.

The only cases in which, apart from questions of breach of contract express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person are where property

(*b*) *Re Courtier, Coles* v. *Courtier, Courtier* v. *Coles*, (1886), 34 Ch. D. 136, C. A., commenting upon *Re Fowler, Fowler* v. *Odell* (1881), 16 Ch. D. 723.

(*c*) *Re Parry and Hopkins*, [1900] 1 Ch. 160.

(*d*) *Adair* v. *Shaw* (1803), 1 Sch. & Lef. 243, 272; *Montford* (*Lord*) v. *Cadogan* (*Lord*) (1810), 17 Ves. 485, 489; *Walsham* v. *Stainton* (1863), 1 De G. J. & Sm. 678, C. A.; *Concha* v. *Murietta, De Mora* v. *Concha* (1889), 40 Ch. D. 543, C. A.; *Wassell* v. *Leggatt*, [1896] 1 Ch. 554. As to breaches of trust, generally, see title TRUSTS AND TRUSTEES.

(*e*) *Devaynes* v. *Robinson* (1857), 24 Beav. 86, 95.

(*f*) *Grayburn* v. *Clarkson* (1868), 3 Ch. App. 605.

(*g*) *Brittlebank* v. *Goodwin* (1868), L. R. 5 Eq. 545, following *dicta* in *Baker* v. *Martin* (1832), 5 Sim. 380; *Story* v. *Gape* (1856), 2 Jur. (N. S.) 706, and *Obee* v. *Bishop* (1859), 1 De G. F. & J. 137, 141, C. A., and dissenting from *Dunne* v. *Doran* (1844), 13 I Eq. R. 545, and *Brereton* v. *Hutchinson* (1853), 2 I. Ch. R. 648, and (1854), 3 I. Ch. R. 361; see, further, titles LIMITATION OF ACTIONS; TRUSTS AND TRUSTEES.

(*h*) *Re Harrison, Smith* v. *Allen*, [1891] 2 Ch. 349.

(*i*) *Re Jordan, Hayward* v. *Hamilton*, [1904] 1 Ch. 260.

(*k*) *Kirk* v. *Todd* (1882), 21 Ch. D. 484, 488 C. A.; see, generally, title ACTION, Vol. I., p. 31, and titles NEGLIGENCE; TORT.

(*l*) *Peek* v. *Gurney* (1873), L. R. 6 H. L. 377.

(*m*) *Peek* v. *Gurney, supra.*

(*n*) *Re Duncan, Terry* v. *Sweeting*, [1899] 1 Ch. 387.

or the proceeds or value of property belonging to another have been appropriated by the deceased person and added to his own estate or money. In such cases the action, though arising out of a wrongful act, does not die with the person. But where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain, the representatives of the wrong-doer cannot be sued merely because it was worth the wrong-doer's while to commit the act and an indirect benefit may have been reaped thereby (*o*).

In cases where the maxim applies, proceedings cannot be pursued against the representative even though the death of the wrong-doer does not take place until after a judgment or order directing an inquiry as to damages (*p*).

Proceedings for statutory penalty.

727. Where proceedings which are authorised by Act of Parliament against a person are in the nature of an action for a personal tort, as, for instance, the right to recover in a summary manner the expenses of repairing a highway caused by extraordinary traffic thereon, the proceedings cannot be taken against the representative of that person after his death (*q*).

Damages against a co-respondent.

728. Where a co-respondent against whom damages have been awarded dies before paying them into court, there is no remedy against his executor in the Divorce Court, and no order for payment can be enforced against him in that court (*r*).

Tortious acts of company director.

729. The statutory liability of a director of a company to compensate a person who has applied for shares or debentures in a company on the faith of a prospectus, for the loss he may have sustained by reason of any untrue statement in the prospectus, does not survive (*s*); but there appears to be a doubt whether the statutory right of contribution amongst the directors is or is not enforceable against the representative of a deceased director (*t*).

(*o*) *Phillips* v. *Homfray* (1883), 24 Ch. D. 439, C. A., *per* BOWEN and COTTON, L.JJ., at p. 454; see *ibid.*, at pp. 457 *et seq.*, for observations upon the following earlier authorities:—*Sherrington's Case* (1582), Sav. 40; *Tucke's Case* (1590), 3 Leon. 241; *Tooley* v. *Windham* (1590), Cro. Eliz. 206; *Winchester* (*Bishop*) v. *Knight* (1718), 1 P. Wms. 406; *Hambly* v. *Trott* (1776), 1 Cowp. 371, 375; *Pulteney* v. *Warren* (1801), 6 Ves. 72; *Lansdowne* (*Marquis*) v. *Lansdowne* (*Dowager Marchioness*) (1815), 1 Madd. 116; *Gardiner* v. *Fell* (1819), 1 Jac. & W. 22; *Monypenny* v. *Bristow* (1832), 2 Russ. & M. 117.

(*p*) *Phillips* v. *Homfray*, *supra*; *Smith* v. *Eyles* (1742), 2 Atk. 385; *Davoren* v. *Wootton*, [1900] 1 I. R. 273, C. A.

(*q*) *Story* v. *Sheard*, [1892] 2 Q. B. 515.

(*r*) *Brydges* v. *Brydges and Wood*, [1909] P. 187, C. A. For divorce, see title HUSBAND AND WIFE.

(*s*) *Shepheard* v. *Bray*, [1906] 2 Ch. 235, *per* WARRINGTON, J., at p. 253 This case was decided upon the Directors Liability Act, 1890 (53 & 54 Vict. c. 64), ss. 3, 5; the present liability is prescribed in similar language by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 84.

(*t*) In *Shepheard* v. *Bray*, *supra*, it was held by WARRINGTON, J., that the right of contribution was enforceable against the representative, but on appeal the order was by consent varied, the court intimating that it was not prepared to assent to all that was decided by WARRINGTON, J.; see *Shepheard* v. *Bray*, [1907] 2 Ch. 571, C. A.

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The remedy for loss sustained by the negligence of a director does not survive (*u*); nor is the particular remedy by way of misfeasance proceedings enforceable against his representatives (*a*). But the estate of a deceased director is liable in respect of claims in the nature of a breach of trust, as, for instance, the payment of dividends out of capital (*b*).

Statutory remedy for wrongs to property.

730. Representatives may be sued for wrongs committed by the deceased to another in respect of his property, real or personal, provided that the injury was committed within six calendar months before the wrong-doer's death, and the action is brought within six calendar months after the representatives have taken upon themselves administration of his estate and effects: the damages in such case rank as a simple contract debt (*c*). Where the injury was committed more than six months before the wrong-doer's death, an action, though brought against him in his lifetime, cannot be maintained against his representatives (*d*).

Continuing wrong.

The test to be applied in ascertaining whether the action under the statute is brought in time is not when the wrong was committed, but when the injury was committed. And, accordingly, in the case of a continuing wrong where the injury accrues from day to day to a period within six calendar months of the wrong-doer's death the action is maintainable (*e*).

SECT. 2.—*In respect of His Own Acts.*

SUB-SECT. 1.—*To Third Parties.*

Liability on representative's own contracts.

731. The representative is personally liable upon his own contracts, and cannot limit his liability to the extent of assets in his hands. Thus, upon counts for goods sold and delivered and work and labour done, he can only be charged personally, and the only possible judgment is *de bonis propriis* (*f*). But an action can be maintained against him in his representative character where the consideration for his promise is a contract or transaction with his testator (*g*).

Representatives of a deceased partner who are entitled to profits, but who never interfere in the business, are not liable as partners in the firm (*h*).

(*u*) *Overend, Gurney & Co.* v. *Gurney* (1869), 4 Ch. App. 701.

(*a*) *Re British Guardian Life Assurance Co.* (1880), 14 Ch. D. 335. For misfeasance proceedings, see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), and title COMPANIES, Vol. V., pp. 478 *et seq.*

(*b*) *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co.* v. *Sharpe*, [1892] 1 Ch. 154, C. A.

(*c*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 2.

(*d*) *Kirk* v. *Todd* (1882), 21 Ch. D. 484, C. A.

(*e*) *Woodhouse* v. *Walker* (1880), 5 Q. B. D. 404; *Jenks* v. *Clifden* (*Viscount*), [1897] 1 Ch. 694 (obstruction of light); see, further, title LIMITATION OF ACTIONS.

(*f*) *Farhall* v. *Farhall* (1871), 7 Ch. App. 123, 127; *Dowse* v. *Coxe* (1825), 3 Bing. 20; *Powell* v. *Graham* (1817), 7 Taunt. 580.

(*g*) *Corner* v. *Shew* (1838), 3 M. & W. 350; *Farhall* v. *Farhall*, *supra*, at p. 128. For the liability of a representative in carrying on his testator's business, see p. 294, *ante*; and for funeral expenses, p. 240, *ante*.

(*h*) *Holme* v. *Hammond* (1872), L. R. 7 Exch. 218; see, as to the liability of

SECT. 2. **In respect of His Own Acts.**

732. The Statute of Frauds (*i*) provides that no action is to be brought against an executor or administrator upon any special promise to answer damages out of his own estate, unless the agreement upon which the action is brought, or some note or memorandum thereof, is in writing and signed by him or by some other person thereunto by him lawfully authorised.

Promise to answer damages out of his own estate.

According to the old law the consideration for the promise must be expressed in the writing, or appear by necessary inference therefrom (*k*); and it is conceived that the law in this respect is still in force, as the subsequent enactment (*l*), which provides that the consideration for a special promise to answer the debt, default, or miscarriage of another need not appear in writing or by necessary inference therefrom, is silent as to a special promise by an executor or administrator to answer damages out of his own estate. The statutory requirement as to a writing does not extend to a promise made by a person, not an executor, prior to his obtaining a grant of letters of administration (*m*).

Consideration for the promise must appear.

733. In addition to the statutory requirement of a writing, the promise requires, like all other agreements not under seal, to be given for a sufficient consideration (*n*), such as giving time for payment (*o*), or undertaking to pay interest on a debt not bearing interest (*p*). Where the instrument, such as a promissory note, is one which *primâ facie* imports a consideration and may induce forbearance, it is not necessary to give evidence of consideration *aliunde* (*q*). There can, of course, be no forbearance to sue a person who has not actually taken out administration (*r*).

Consideration must be sufficient.

734. A person who is under an obligation to indorse a bill of exchange in a representative capacity may indorse it in such terms as to negative personal liability (*s*). If he fails to indorse it in such terms he is personally liable upon it (*t*).

Indorsement of bills of exchange.

735. The representative is, of course, personally responsible for all torts committed by himself; but where the injury has been occasioned by himself or his agents in the reasonable management of the trust estate, he is entitled to be indemnified out of the

Torts committed by representative.

persons holding themselves out as partners, and as to what acts constitute partners, title PARTNERSHIP.

(*i*) 29 Car. 2, c. 3, s. 4; see also title CONTRACTS, Vol. VII., p. 361.

(*k*) *Wain* v. *Warlters* (1804), 5 East, 10; *Saunders* v. *Wakefield* (1821), 4 B. & Ald. 595; 1 Wms. Saund. 211, n. (d).

(*l*) Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 79), s. 3.

(*m*) *Tomlinson* v. *Gill* (1756), Amb. 330.

(*n*) *Reech* v. *Kennegal* (1748), 1 Ves. Sen. 123; *Rann* v. *Hughes* (1778), 7 Term Rep. 350, n.; *Jones* v. *Tanner* (1827), 7 B. & C. 542.

(*o*) *Davis* v. *Reyner* (1671), 2 Lev. 3; *Hawes* v. *Smith* (1675), 2 Lev. 122.

(*p*) *Bradly* v. *Heath* (1830), 3 Sim. 543; *Jones* v. *Ashburnham* (1804), 4 East, 455; *Childs* v. *Monins* (1821), 2 Brod. & Bing. 460.

(*q*) *Ridout* v. *Bristow* (1830), 1 Cr. & J. 231.

(*r*) *Nelson* v. *Serle* (1839), 4 M. & W. 795, Ex. Ch.

(*s*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 31 (5); see also title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 506.

(*t*) *King* v. *Thom* (1786), 1 Term Rep. 487.

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assets (*a*); and the person injured has the right to be subrogated to the representative's indemnity (*b*).

SUB-SECT. 2.—*On a Devastavit.*

Nature of a *devastavit.*

736. A personal representative in accepting the office accepts the duties of the office, and becomes a trustee in the sense that he is personally liable in equity for all breaches of the ordinary trusts which in courts of equity are considered to arise from his office (*c*). The violation of his duties of administration is termed a *devastavit:* the term "*devastavit*" is applicable not only to a misuse by the representative of the effects of the deceased, as by spending or converting them to his own use, but also to acts of maladministration or negligence (*d*).

Maladministration.

737. Thus a representative commits a *devastavit* if he pays debts otherwise than in their due order; if he makes payments to legatees without providing for debts (*e*); if he applies the assets in payment of claims which he has no right to satisfy (*f*). The duties of the representative with regard to the getting in of the estate and the investment of money in hand have been previously dealt with (*g*): a breach of such duties amounts to a *devastavit.* An executor is also liable for paying a legatee a sum greater than is warranted by the existing state of the assets; but he will not be disallowed a payment made to one of several residuary legatees, because through a subsequent decrease in the value of the assets such residuary legatee may have received more than the other residuary legatees (*h*).

Negligence.

738. Similarly a representative is guilty of a *devastavit* where loss occurs to the estate owing to his negligence, as where by his delay in taking proceedings a debtor is enabled to plead the statutory limitations (*i*), or if the debt is lost owing to the debtor's bankruptcy or inability to pay (*k*); or if he allows debts bearing interest to run on when he has assets in hand sufficient to discharge them (*l*). No

(*a*) *Benett* v. *Wyndham* (1862), 4 De G. F. & J. 259, C. A.; *Re Raybould, Raybould* v. *Turner*, [1900] 1 Ch. 199.

(*b*) *Re Raybould, Raybould* v. *Turner, supra.*

(*c*) *Re Marsden, Bowden* v. *Layland, Gibbs* v. *Layland* (1884), 26 Ch. D. 783, *per* KAY, J., at p. 789.

(*d*) Bac. Abr., tit. Executors and Administrators (L), 1.

(*e*) For the statutory protection given to representatives who advertise for debts, see p. 243, *ante.* Where the representative fails to advertise, it would appear that he cannot rely on mere want of notice of the debt; see *Chelsea Waterworks* (*Governor & Co.*) v. *Cowper* (1795), 1 Esp. 275; *Norman* v. *Baldry* (1834), 6 Sim. 621; *Smith* v. *Day* (1837), 2 M. & W. 684; *Hill* v. *Gomme* (1839), 1 Beav. 540.

(*f*) Com. Dig., tit. Administration (I, 1); *Shallcross* v. *Wright* (1850), 12 Beav. 558; *Midgley* v. *Midgley*, [1893] 3 Ch. 282, C. A.

(*g*) See p. 242, *ante.*

(*h*) *Lloyd* v. *Lloyd* (1875), 23 W. R. 787.

(*i*) *Hayward* v. *Kinsey* (1701), 12 Mod. Rep. 568, 573.

(*k*) See p. 242, *ante.*

(*l*) *Bate* v. *Robins* (1863), 32 Beav. 73; *Hall* v. *Hallet* (1784), 1 Cox, Eq. Cas. 134; *Dornford* v. *Dornford* (1806), 12 Ves. 127, 130. He is not liable for loss arising from his payment of a non-interest-bearing debt before an interest-bearing debt (*Re Stevens, Cooke* v. *Stevens*, [1898] 1 Ch. 162, C. A., *per* CHITTY, L.J., at p. 174.

liability, however, attaches to executors for delay in proving the will (*m*).

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739. Where the assets of the testator have come into the possession of the representative and are afterwards lost to the estate, the equitable rule that the representative stands in the position of a gratuitous bailee, and cannot therefore be charged without some wilful default (*n*), is applicable (*o*). It rests upon the person seeking to charge the representative to show that the loss was attributable to his wilful default, and it does not rest upon the representative to show that it was not (*p*).

Representative a gratuitous bailee.

A personal representative enjoys the same protection as a trustee against losses incurred by the appointment of an agent, solicitor, or banker (*q*).

Losses arising from employment of agents.

740. A person injured by a *devastavit* is but a simple contract creditor of the representative, and if he elects to sue the representative in that form of action his claim is barred at the expiration of six years from the date on which the act of *devastavit* was committed (*a*).

Remedy against *devastavit*.

In the case, however, of an order to account made against a representative in administration proceedings, as distinguished from a claim in respect of a *devastavit*, it was the rule in equity that the representative could not, in rendering his accounts, first set up his own *devastavit*, and upon such *devastavit* raise the defence of the Statute of Limitation. This rule was based upon the principle that so far as he was not able to discharge himself, the assets must be treated as still in his hands (*b*), and was established at a time when there was no Statute of Limitation upon which a trustee could rely; and it is an open question whether the benefit of lapse of time as a bar to a claim now given by statute (*c*) to trustees does not

Position of representative who has committed a *devastavit*.

(*m*) *Re Stevens, Cooke* v. *Stevens*, [1897] 1 Ch. 422; affirmed, [1898] 1 Ch. 162, C. A.; *Re Griffiths Morris, Morris* v. *Morris* (1908), 124 L. T. Jo. 315.

(*n*) *Job* v. *Job* (1877), 6 Ch. D. 562; *Jones* v. *Lewis* (1751), 2 Ves. Sen. 240, 241. The old rule at common law was that the representative was liable for the loss of assets, once they had come to his hands; see *Crosse* v. *Smith* (1806), 7 East, 246.

(*o*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 24; see title TRUSTS AND TRUSTEES.

(*p*) *Re Brier, Brier* v. *Evison* (1884), 26 Ch. D. 238, C. A.

(*q*) As to such protection, see *Speight* v. *Gaunt* (1883), 9 App. Cas. 1, 4; *Re Parsons, Ex parte Belchier, Ex parte Parsons* (1754), Amb. 218; *Jobson* v. *Palmer*, [1893] 1 Ch. 71; *Shepherd* v. *Harris*, [1905] 2 Ch. 310; Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 17 (1), (2), (5), 43; and title TRUSTS AND TRUSTEES.

(*a*) *Charlton* v. *Low* (1734), 3 P. Wms. 328, 331; *Thorne* v. *Kerr* (1855), 2 K. & J. 54; *Re Gale, Blake* v. *Gale* (1883), 22 Ch. D. 820; and see *Lacons* v. *Wormoll*, [1907] 2 K. B. 350, C. A.: the ground of complaint by the plaintiff against the representative, in an action in respect of a *devastavit*, is the wrongful act of the representative in wasting the assets, *ibid.*, *per* Lord ALVERSTONE, C.J., at p. 360. See further pp. 330 *et seq.*, *post*.

(*b*) *Re Marsden, Bowden* v. *Layland, Gibbs* v. *Layland* (1884), 26 Ch. D. 783; *Re Hyatt, Bowles* v. *Hyatt* (1888), 38 Ch. D. 609; *Lacons* v. *Wormoll*, *supra*, *per* BUCKLEY, L.J., at p. 367.

(*c*) Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8; see also title LIMITATION OF ACTIONS.

SECT. 2. In respect of His Own Acts.

apply to a legal personal representative sued in administration proceedings (*d*), and whether his liability in respect of money honestly paid away by him is not barred at the expiration of six years from the date of payment, whatever be the form of proceedings by which it is sought to enforce the liability (*e*).

Proof for *devastavit* in bankruptcy.

741. Upon the bankruptcy of the representative the person injured by a *devastavit* may put in a proof (*f*). Where a sole representative becomes bankrupt it would seem that he cannot prove against himself without an order of the court (*g*). In such a case a legatee may apply for leave to prove (*h*). Where the bankrupt representative is one of several representatives, the others may prove in his bankruptcy in respect of his *devastavit* (*i*).

Liability of representative's representative.

742. Executors and administrators, whether of executors *de son tort* or of rightful executors or administrators who have committed a *devastavit*, are liable in the same manner as their testator or intestate would have been, if living (*k*): their liability is, of course, limited to the value of the assets of their testator or intestate.

Concurrence in *devastavit*.

The concurrence in the act of *devastavit* of the party suing, as a general rule, releases the representatives from liability (*l*), even though the party concurring derived no benefit therefrom (*m*).

Statutory jurisdiction of High Court.

743. The court has jurisdiction (*n*) where the representative commits a breach of trust at the instigation or request or with the consent in writing (*o*) of a beneficiary, notwithstanding that the beneficiary may be a married woman entitled for her separate use and restrained from anticipation, to impound the interest of the beneficiary in the trust estate. In order to impound the interest of the beneficiary it must be shown that he knew the facts which would make the act a breach of trust (*p*). The statutory

(*d*) Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 1 (3); see also *ibid.*, s. 8 (3). In *Lacons* v. *Wormoll*, [1907] 2 K. B. 350, C. A., Lord ALVERSTONE, C.J., at p. 362, stated that he was not entirely satisfied that an executor, merely as such, came within the definition of a trustee given by the Act, but he expressed no opinion on the matter: BUCKLEY, L.J., did not deal with the point.

(*e*) Compare the judgments of FLETCHER MOULTON, L.J., and BUCKLEY, L.J., in *Lacons* v. *Wormoll*, *supra*.

(*f*) Toller, Law of Executors (ed. Preston), 429.

(*g*) *Re Howard and Gibbs, Ex parte Shaw* (1822), 1 Gl. & J. 127; *Re Colman, Ex parte Colman* (1833), 2 Deac. & Ch. 584.

(*h*) *Re Warne, Ex parte Moody* (1816), 2 Rose, 413; *Re Boyes, Ex parte Beilby, Ex parte Preston* (1821), 1 Gl. & J. 167.

(*i*) *Re Davis, Ex parte Courtenay* (1835), 2 Mont. & A. 227; see also title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 210.

(*k*) Stat. (1678) 30 Car. 2, c. 7; stat. (1692) 4 Will. & Mar. c. 24, s. 12; see notes to *Wheatley* v. *Lane* (1669), 1 Wms. Saund. 216 a, 219 a; *Coward* v. *Gregory* (1866), L. R. 2 C. P. 153.

(*l*) *Walker* v. *Symonds* (1818), 3 Swan. 1, 64.

(*m*) *Chillingworth* v. *Chambers*, [1896] 1 Ch. 685, 700, C. A.; *Re Somerset, Somerset* v. *Poulett* (*Earl*), [1894] 1 Ch. 231, C. A.; *Fletcher* v. *Collis*, [1905] 2 Ch. 24, C. A.

(*n*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 45 (1).

(*o*) The instigation or request need not be in writing, see *Griffith* v. *Hughes*, [1892] 3 Ch. 105, a decision upon the same words in s. 6 (now repealed) of the Trustee Act, 1888 (51 & 52 Vict. c. 59).

(*p*) *Re Somerset, Somerset* v. *Poulett* (*Earl*), *supra*.

jurisdiction to impound does not operate to deprive the representative of the benefit of the general rule above referred to (*a*).

SECT. 2. In respect of His Own Acts.

Statutory relief of representative.

744. The court has also jurisdiction to relieve a personal representative either wholly or partly from personal liability for a breach of trust where he has acted honestly and reasonably, and ought fairly to be excused for the breach and for omitting to obtain the directions of the court in the matter in which he committed the breach (*b*). Each case must be decided on its own merits, but the court must be satisfied that the representative acted reasonably as well as honestly (*c*).

Thus executors may in special circumstances be relieved from liability for failure to get in debts owing to the estate (*d*), for making payments to their solicitors in reliance upon their statement that the sums were required for purposes of administration (*e*), or for making payments to legatees where they have reason to believe that the estate is solvent (*f*).

SECT. 3.—*In respect of the Acts of a Co-representative.*

Liability for acts of co-executor.

745. In the absence of any provision to the contrary contained in the will, an executor is chargeable only for money and securities actually received by him, notwithstanding his signing any receipt for the sake of conformity, and is answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other executor (*g*).

Duty of executor to take care.

746. It is, however, the duty of executors to watch over and, if necessary, to correct the conduct of each other (*h*); and an executor who stands by and sees a breach of trust committed by his co-executor becomes himself responsible for that breach (*i*).

Assets unnecessarily entrusted to co-executor.

It is not incumbent on one executor by force to prevent money from getting into the hands of another executor (*k*); but if he unnecessarily hands over assets to a co-executor (*l*), or unnecessarily does an act which enables his co-executor to obtain sole possession of the assets (*m*), he is liable for the loss incurred thereby.

(*a*) *Fletcher* v. *Collis*, [1905] 2 Ch. 24, C. A.

(*b*) Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), ss. 1 (2), 3 (1); see also title TRUSTS AND TRUSTEES.

(*c*) *Re Turner*, *Barker* v. *Ivimey*, [1897] 1 Ch. 536.

(*d*) *Re Roberts*, *Knight* v. *Roberts* (1897), 76 L. T. 479, C. A.; *Re Grindey*, *Clews* v. *Grindey*, [1898] 2 Ch. 593, C. A.

(*e*) *Re De Clifford's (Lord) Estate*, *De Clifford (Lord)* v. *Quilter*, *De Clifford (Lord)* v. *Lansdowne (Marquis)*, [1900] 2 Ch. 707, following *Bacon* v. *Bacon* (1800), 5 Ves. 331.

(*f*) *Re Kay*, *Mosley* v. *Kay*, [1897] 2 Ch. 518.

(*g*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 24; see also title TRUSTS AND TRUSTEES.

(*h*) *Styles* v. *Guy* (1848), 1 Mac. & G. 422, 433.

(*i*) *Booth* v. *Booth* (1838), 1 Beav. 125; *Williams* v. *Nixon* (1840), 2 Beav. 472.

(*k*) *Langford* v. *Gascoyne* (1805), 11 Ves. 333.

(*l*) *Townsend* v. *Barber* (1763), 1 Dick. 356; *Lincoln* v. *Wright* (1841), 4 Beav. 427; see also *Lowe* v. *Shields*, [1902] 1 I. R. 320, C. A.

(*m*) *Candler* v. *Tillett* (1855), 22 Beav. 257, 263; *Lewis* v. *Nobbs* (1878), 8 Ch. D. 591.

SECT. 3. In respect of the Acts of a Co-representative.

Tests of liability.

The test of his liability is the necessity of the act; if the act is one which is required by the regular course of business, it is not an unnecessary act (*n*). Thus, if money is required for the payment of debts or legacies, one executor is safe in joining in the sale of assets and permitting another executor to receive the proceeds for that purpose; but if he joins in such sale when the money is not required, and he has no reasonable grounds for believing that it is so required, he is liable for the money so received by his co-executor (*o*): and it would appear that he cannot safely intrust his co-executor with the assets for the purpose of handing them over to the residuary legatee (*p*).

SECT. 4.—*Liability to Account.*

Duty to keep clear accounts.

747. It is the duty of executors and administrators to keep clear and accurate accounts, and to be always ready to render such accounts when called upon to do so (*q*). It is no excuse that they are inexperienced in keeping accounts, for in such case it would be their duty to employ a competent accountant to keep them (*r*). Where they are required to furnish accounts, they may demand to have the costs of doing so paid or guaranteed before complying with the request (*s*). A legatee is not entitled to a copy of the accounts at the expense of the estate (*t*), but he is entitled to inspect the accounts kept by the representative.

No claim for allowance for time and trouble.

748. The personal representative is not entitled to any allowance for his time and trouble in transacting business relating to the estate; he is entitled to his out-of-pocket expenses only (*a*). Thus, he cannot claim commission for collecting rents (*b*), nor for acting as auctioneer (*c*), or banker (*d*); nor, where he is at once the partner and executor of the deceased, can he claim an allowance for carrying on the business (*e*); but in special circumstances the court may allow him remuneration for acts done in connection with the estate (*f*).

(*n*) *Clough* v. *Bond* (1837), 3 My. & Cr. 490, 496; *Re Gasquoine, Gasquoine* v. *Gasquoine*, [1894] 1 Ch. 470, C. A.

(*o*) *Terrell* v. *Matthews* (1841), cited 1 Mac. & G. 433, n.; see, too, *Chambers* v. *Minchin* (1802), 7 Ves. 186, 193; *Brice* v. *Stokes* (1805), 11 Ves. 319; *Shipbrook* (*Lord*) v. *Hinchinbrook* (*Lord*) (1810), 16 Ves. 477; *Underwood* v. *Stevens* (1816), 1 Mer. 712; *Lees* v *Sanderson* (1830), 4 Sim. 28.

(*p*) *Moses* v. *Levi* (1839), 3 Y. & C. (EX.) 359.

(*q*) *Freeman* v. *Fairlie* (1812), 3 Mer. 29, 43, 44; *Pearse* v. *Green* (1819), 1 Jac. & W. 135, 140; *Thompson* v. *Dunn* (1870), 5 Ch. App. 573; see also title TRUSTS AND TRUSTEES.

(*r*) *Wroe* v. *Seed* (1863), 4 Giff. 425, 429.

(*s*) *Re Bosworth, Martin* v. *Lamb* (1889), 58 L. J. (CH.) 432.

(*t*) *Ottley* v. *Gilby* (1845), 8 Beav. 602.

(*a*) *Robinson* v. *Pett* (1734) 3 P. Wms. 249; *Brocksopp* v. *Barnes* (1820), 5 Madd. 90; *Broughton* v. *Broughton* (1855), 5 De G. M. & G. 160, 164; *Re Barber, Burgess* v. *Vinicome* (1886), 34 Ch. D. 77, 80.

(*b*) *Nicholson* v. *Tutin* (No. 2) (1857), 3 K. & J. 159.

(*c*) *Kirkman* v. *Booth* (1848), 11 Beav. 273.

(*d*) *Heighington* v. *Grant* (1840), 5 My. & Cr. 258, 262.

(*e*) *Burden* v. *Burden* (1813), 1 Ves. & B. 170; *Stocken* v. *Dawson* (1843), 6 Beav. 371.

(*f*) *Marshall* v. *Holloway* (1818), 2 Swan. 432, 453; *Forster* v. *Ridley* (1864),

The principle of disallowing remuneration applies to the case of a firm in which the personal representative is a partner (*g*), unless there is an express agreement between the partners that the executor-partner shall not participate in the profits to be derived from the business connected with the estate (*h*).

Former right to commission on Indian assets.

749. In the case of Indian assets, an executor was formerly entitled to a commission of 5 per cent. on all assets actually collected by him in India (*i*): the allowance did not extend to assets remitted to the executor and received by him in England (*k*), nor was he entitled to it where he had a legacy for his trouble (*l*). The allowance was based on the existing practice of the Indian courts; that practice has since been superseded (*m*), and accordingly it would appear that no such allowance would be made at the present day.

Solicitor-representative.

750. The rule that the representative is not entitled to any allowance for his time and trouble applies to the case of a solicitor-executor, or solicitor-administrator (*n*). In the absence of a special clause in the will authorising him to charge for professional services, he is only entitled to out-of-pocket expenses, and not to profit costs for work done out of court, whether acting for himself or for the body of executors (*o*); the firm of which he may happen to be a partner is entitled to no larger allowance (*p*), although all the business may have been transacted by his partner (*q*).

Representative must account for profit costs.

751. Should the representative in disregard of the above rule have received any profit costs, he must account for them to the estate, even though they were not earned at its expense. Thus he must refund the profit costs received by him in preparing a lease, although the costs were paid by the lessee (*r*), and he must refund commission received by him upon the introduction of business connected with the trust (*s*).

4 De G. J. & Sm. 452, C. A.; *Re Freeman's Settlement Trusts* (1887), 37 Ch. D. 148.

(*g*) *Matthison* v. *Clarke* (1854), 3 Drew. 30; and see *Re Lewis*, *Lewis* v. *Lewis*, [1910] W. N. 217.

(*h*) *Clack* v. *Carlon* (1861), 30 L. J. (CH.) 639; *Re Doody*, *Fisher* v. *Doody*, *Hibbert* v. *Lloyd*, [1893] 1 Ch. 129, 134, C. A.

(*i*) *Chetham* v. *Audley* (*Lord*) (1798), 4 Ves. 72; *Cockerell* v. *Barber* (1826), 2 Russ. 585; *Matthews* v. *Bagshaw* (1851), 14 Beav. 123.

(*k*) *Denton* v. *Davy* (1836), 1 Moo. P. C. C. 15, 40; *Campbell* v. *Campbell* (1842), 13 Sim. 168.

(*l*) *Freeman* v. *Fairlie* (1817), 3 Mer. 24.

(*m*) See Administrator-General's Act, 1874 (Indian Act II. of 1874), s. 56.

(*n*) As to remuneration of solicitor generally, see title SOLICITORS; see also title TRUSTS AND TRUSTEES.

(*o*) *Lincoln* v. *Windsor* (1851), 9 Hare, 158; *Broughton* v. *Broughton* (1855), 5 De G. M. & G. 160; *Re Barber*, *Burgess* v. *Vinicome* (1886), 34 Ch. D. 77.

(*p*) *Collins* v. *Carey* (1839), 2 Beav. 128.

(*q*) *Christophers* v. *White* (1847), 10 Beav. 523. For the exception to this rule where there is an express agreement that the executor-partner is not to participate in the profits of the firm, see *Clack* v. *Carlon*, *supra*, and *Re Doody*, *Fisher* v. *Doody*, *Hibbert* v. *Lloyd*, *supra*.

(*r*) *Re Corsellis*, *Lawton* v. *Elwes* (1887), 34 Ch. D. 675, C. A.

(*s*) *Vipont* v. *Butler*, [1893] W. N. 64.

SECT. 4. Liability to Account.

Work done in actions.

752. The rule applies where the solicitor does business in court acting for himself as solicitor, whether he be plaintiff or defendant in the action (*t*). There is, however, one exception to this rule: where the solicitor has acted in an action, whether of a hostile nature or not, not only on his own behalf, but on behalf of his co-representatives also, he will not be prevented from receiving the usual costs, so far as he has not himself added to the expense which would have been incurred if he had appeared only for them (*u*).

Costs of town agent.

Where the solicitor-executor practises in the country and employs a London agent to act in litigation in which the estate is concerned, he is entitled to pay and to be allowed out of the estate his share of the profit costs receivable by the town agent (*a*).

Full costs allowed when acting for beneficiary.

753. A solicitor-executor may act as solicitor for a beneficiary in an action relating to the estate, because that is not part of the trust properly so called, and if his beneficiary obtains his costs out of the estate, the solicitor is not deprived of such costs (*b*); but he should not act for a party who occupies an adverse position to the estate, and if he does so he will be disallowed his profit costs (*c*).

Where special direction in the will.

754. A testator may of course authorise by his will his solicitor-executor to be paid for professional work (*d*), or for work which an ordinary lay executor could have done in person without the assistance of a solicitor (*e*). But to entitle a solicitor to the latter charges there must be clear words in the will (*f*); a direction that he should be paid all usual professional charges is not sufficient (*g*).

Authority to make professional charges is a legacy.

An authority to a professional executor to make professional charges is a legacy, is liable to duty, and will fail if the executor has attested the will (*h*); and it cannot receive effect where the estate is insolvent (*i*).

Judicial and Public Trustee.

755. The court has statutory jurisdiction to allow remuneration to a personal representative who is a judicial trustee (*k*).

(*t*) *Re Barber, Burgess* v. *Vinicome* (1886), 34 Ch. D. 77, *per* CHITTY, J., at p. 81.

(*u*) *Cradock* v. *Piper* (1849), 1 Mac. & G. 664, followed in *Re Barber, Burgess* v. *Vinicome, supra; Re Corsellis, Lawton* v. *Elwes* (1887), 34 Ch. D. 675, C. A.; *Re Doody, Fisher* v. *Doody, Hibbert* v. *Lloyd*, [1893] 1 Ch. 129, C. A.; *Bainbrigge* v. *Blair* (1845), 8 Beav. 588, must be treated as overruled; see *Re Barber, Burgess* v. *Vinicome, supra, per* CHITTY, J., at p. 83.

(*a*) *Burge* v. *Brutton* (1843), 2 Hare, 373.

(*b*) *Re Barber, Burgess* v. *Vinicome, supra*, at p. 81.

(*c*) *Re Corsellis, Lawton* v. *Elwes, supra.*

(*d*) *Re Sherwood* (1840), 3 Beav. 338, 341.

(*e*) See *Re Ames, Ames* v. *Taylor* (1883), 25 Ch. D. 72; *Re Fish, Bennett* v. *Bennett*, [1893] 2 Ch. 413, C. A.; *Willis* v. *Kibble* (1839), 1 Beav. 559.

(*f*) *Re Chalinder and Herington*, [1907] 1 Ch. 58.

(*g*) *Re Chapple, Newton* v. *Chapman* (1884), 27 Ch. D. 584; see, too, *Clarkson* v. *Robinson*, [1900] 2 Ch. 722, where it was held that an authority to charge for all professional services, whether in the ordinary course of the executor's profession or not, did not authorise a charge for work done outside the executor's profession.

(*h*) *Re Barber, Burgess* v. *Vinicome* (1886), 31 Ch. D. 665; *Re Pooley* (1888), 40 Ch. D. 1, C. A.

(*i*) *Re White, Pennell* v. *Franklin*, [1898] 2 Ch. 217, C. A.

(*k*) Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 1 (5); see *Re Ratcliff*, [1898] 2 Ch. 352.

Fees are also payable where the Public Trustee acts as personal representative (*l*).

SECT. 4. Liability to Account.

756. It is an imperative rule of the court that a personal representative shall not derive any pecuniary benefit from his office (*m*); he must account to the estate for all profit derived from the trust property or from his office (*n*). Thus he may not either directly or indirectly purchase any portion of the assets from himself (*o*); and an executor who renews a lease (*p*), who purchases the reversion of a lease which is renewable by contract or by custom (*q*), or who purchases the equity of redemption of a mortgage vested in him as executor (*r*), will be taken to have done so for the benefit of the estate. Similarly, he cannot buy debts due to the estate (*s*) or legacies (*t*) at less than their full amount.

Representative may make no profit out of estate.

So, too, a representative who in the course of carrying on his testator's business supplies goods to that business from his own must, in the absence of an express authority in the will, account for all profits made by the transaction (*a*).

757. A representative who employs assets in his own business is liable to account at the option of the beneficiaries either for the profits actually made or for interest on the sum employed (*b*). Where the representative has mixed the assets with his own money and has employed both in his trade, the beneficiaries, if they elect to take the profits instead of interest, can only insist on the proportionate share attributable to the employment (*c*).

Liability where he employs the assets in his own business.

Where the beneficiaries elect to claim interest, the principle upon which the court proceeds is not to visit the representative with compound interest by way of punishment, but to charge him with the interest he has in fact received, or which it is just to say he ought to have received, or which it is so fairly to be presumed that he did receive that he is estopped from saying that he did not

(*l*) Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 9; see title TRUSTS AND TRUSTEES.

(*m*) *Crosskill* v. *Bower*, *Bower* v. *Turner* (1863), 32 Beav. 86.

(*n*) *Sugden* v. *Crossland* (1856), 3 Sm. & G. 192, where an executor-trustee who had accepted a sum of money to retire from his office was ordered to refund.

(*o*) *Hall* v. *Hallet* (1784), 1 Cox, Eq. Cas. 134.

(*p*) *Keech* v. *Sandford* (1726), Cas. *temp.* King, 61; *Kelly* v. *Kelly* (1874), 8 I. R. Eq. 403; *Re Biss*, *Biss* v. *Biss*, [1903] 2 Ch. 40, 61, C.A.

(*q*) See *Phillips* v. *Phillips* (1885), 29 Ch. D. 673, C. A. *Secus*, where the lease is not so renewable (*Longton* v. *Wilsby* (1897), 76 L. T. 770; *Bevan* v. *Webb*, [1905] 1 Ch. 620; see also *Randall* v. *Russell* (1817), 3 Mer. 190).

(*r*) *Fosbrooke* v. *Balguy* (1833), 1 My. & K. 226.

(*s*) *Anon.* (1707), 1 Salk. 155; *Ex parte James* (1803), 8 Ves. 337, 346.

(*t*) *Barton* v. *Hassard* (1843), 3 Dr. & War. 461. The purchase will be set aside in favour of the legatees who sold their interests; it will not operate as a release of the estate so as to enure for the benefit of the co-legatees (*ibid.*).

(*a*) *Re Sykes*, *Sykes* v. *Sykes*, [1909] 2 Ch. 241, C. A., overruling *Smith* v. *Langford* (1840), 2 Beav. 362.

(*b*) *Docker* v. *Somes* (1834), 2 My. & K. 655; *Wedderburn* v. *Wedderburn* (1838), 4 My. & Cr. 41; *Jones* v. *Foxall* (1852), 15 Beav. 388; *Macdonald* v. *Richardson*, *Richardson* v. *Marten* (1858), 1 Giff. 81; *Townend* v. *Townend* (1859), 1 Giff. 201; *Vyse* v. *Foster* (1872), 8 Ch. App. 309, 329; *Re Davis*, *Davis* v. *Davis*, [1902] 2 Ch. 314.

(*c*) *Docker* v. *Somes*, *supra*; *Wedderburn* v. *Wedderburn*, *supra*.

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receive it (*d*). Where the money has been employed in an ordinary trade, the court presumes that the party against whom relief is sought has made that amount of profit which persons ordinarily do make in trade, and in that case directs compound interest (*e*). In the case of a solicitor's business it is not to be presumed that compound interest could have been made (*f*). The ordinary mercantile rate of interest is to be taken at 5 per cent. (*g*).

Where he has made unauthorised payments.

758. Where the representative has paid away money to the wrong party, though under a *bonâ fide* mistake, or has made unauthorised investments, he is to be treated as having the sum in hand, and must replace the capital with interest (*h*): it is no answer that he has acted on legal advice (*i*). But he will not be charged with interest at the instance of a beneficiary who was in a position to ask for accounts long before the application (*k*), nor in respect of disbursements honestly made, but disallowed in taking his accounts (*l*).

Interest upon balances due by representative.

759. Upon balances found due from him in taking his accounts, simple interest is charged as a rule (*m*), the rate now taken being 3 per cent. (*n*). Where a special case is made out, interest may be charged at a higher rate, or with annual rests (*o*); thus, where the will contains a trust for accumulation, compound interest will be charged (*p*); and where the representative, without actually trading with the assets, has appropriated them for the payment of his own debts, or made use of them for his own enjoyment, he will be

(*d*) *A.-G.* v. *Alford* (1855), 4 De G. M. & G. 843, 851; *Burdick* v. *Garrick* (1870), 5 Ch. App. 233, 241.

(*e*) See *Burdick* v. *Garrick*, *supra*, at p. 242; see also *Walrond* v. *Walrond* (1861), 29 Beav. 586; *Jones* v. *Foxall* (1852), 15 Beav. 388; *Williams* v. *Powell* (1852), 15 Beav. 461; *Walker* v. *Woodward* (1826), 1 Russ. 107; *Tebbs* v. *Carpenter* (1816), 1 Madd. 290; but compare *A.-G.* v. *Solly* (1829), 2 Sim. 518.

(*f*) *Burdick* v. *Garrick*, *supra*.

(*g*) *Vyse* v. *Foster* (1872), 8 Ch. App. 309, 329; *Re Davis*, *Davis* v. *Davis*, [1902] 2 Ch. 314.

(*h*) *A.-G.* v. *Köhler* (1861), 9 H. L. Cas. 654; *Re Hulkes*, *Powell* v. *Hulkes* (1886), 33 Ch. D. 552, dissenting from *Saltmarsh* v. *Barrett* (No. 2) (1862), 31 Beav. 349.

(*i*) *Doyle* v. *Blake* (1804), 2 Sch. & Lef. 231, 243; *Boulton* v. *Beard* (1853), 3 De G. M. & G. 608, C. A.; *National Trustees Co. of Australasia* v. *General Finance Co. of Australasia*, [1905] A. C. 373, P. C.

(*k*) *Jones* v. *Morrell* (1852), 2 Sim. (N. S.) 241.

(*l*) *Re Jones*, *Christmas* v. *Jones*, [1897] 2 Ch. 190.

(*m*) *Re Barclay*, *Barclay* v. *Andrew*, [1899] 1 Ch. 674, *per* STIRLING, J., at p. 682.

(*n*) See *Re Barclay*, *Barclay* v. *Andrew*, *supra*; see also *Re Goodenough*, *Marland* v. *Williams*, [1895] 2 Ch. 537; *Re Lambert*, *Middleton* v. *Moore*, [1897] 2 Ch. 169; *Rowlls* v. *Bebb*, *Re Rowlls*, *Walters* v. *Treasury Solicitor*, [1900] 2 Ch. 107, C. A.; *Wyman* v. *Paterson*, [1900] A. C. 271; *Re Whiteford*, *Inglis* v. *Whiteford*, [1903] 1 Ch. 889.

(*o*) *Rocke* v. *Hart* (1805), 11 Ves. 58; *Tebbs* v. *Carpenter* (1816), 1 Madd. 290, 306.

(*p*) *Raphael* v. *Boehm* (1805), 11 Ves. 92, 107; affirmed (1807), 13 Ves. 407; *Dornford* v. *Dornford* (1806), 12 Ves. 127; *Knott* v. *Cottee* (1852), 16 Beav. 77; *Gilroy* v. *Stephen* (1882), 30 W. R. 745; *Re Emmet's Estate*, *Emmet* v. *Emmet* (1881), 17 Ch. D. 142; *Re Barclay*, *Barclay* v. *Andrew*, *supra*.

charged with interest at the higher rate of 5 per cent. (*q*). The special case need not necessarily be made prior to the original judgment in the action (*r*).

Interest upon balances due to representative.

760. A representative who discharges debts due from the estate out of his own money is entitled to be allowed the sums so paid in taking his accounts (*s*), together with interest (*t*). The interest should only be calculated on balances found due to him on the master's certificate (*a*), but the balances may be struck annually (*b*), and interest allowed, although the debts themselves did not carry interest (*c*). The representative is not allowed interest on payments made out of his own money in respect of costs (*d*).

Power to employ and pay agents.

761. As a general rule the personal representative ought not to employ an agent to perform the duties which, by accepting the office, he has taken upon himself (*e*). But he may do so in special cases, as where there are weekly rents to collect (*f*), a large number of book debts to get in (*g*), or from the nature of the accounts an accountant is required (*h*); in such cases he is allowed the expense of the employment. He may pay a stockbroker's fee for identifying him at the bank on the occasion of a transfer of stock (*i*), and may charge for a power of attorney where he cannot, without inconvenience and expense, attend at the bank in person to effect the transfer (*k*).

Power to employ solicitor.

He is also entitled to employ and charge for the services of a solicitor, but not for doing work which he himself could do, as, for instance, writing an ordinary letter (*l*). The beneficiaries may, either before payment or within twelve calendar months after payment, apply for an order to have the bill taxed as against the solicitor (*m*). Even after the bill is no longer subject to taxation as between the personal representative and the solicitor, the beneficiaries may as against the former have it inquired into and moderated in chambers (*n*).

(*q*) *Piety* v. *Stace* (1799), 4 Ves. 620; *Mousley* v. *Carr* (1841), 4 Beav. 49; *Westover* v. *Chapman* (1844), 1 Coll. 177; see also *Treves* v. *Townshend* (1784), 1 Bro. C. C. 384; *Berwick-upon-Tweed Corporation* v. *Murray* (1857), 7 De G. M. & G. 497, 519; *Re Jones, Jones* v. *Searle* (1883), 49 L. T. 91.

(*r*) *Re Barclay, Barclay* v. *Andrew*, [1899] 1 Ch. 674.

(*s*) *Spackman* v. *Holbrook* (1860), 2 Giff. 198.

(*t*) *Small* v. *Wing* (1730), 5 Bro. Parl. Cas. 66, 72.

(*a*) *Gordon* v. *Trail* (1820), 8 Price, 416.

(*b*) *Finch* v. *Pescott* (1874), L. R. 17 Eq. 554.

(*c*) *Biggar* v. *Eastwood* (1884), 15 L. R. Ir. 219.

(*d*) *Gordon* v. *Trail, supra; Lewis* v. *Lewis* (1850), 13 Beav. 82.

(*e*) *Weiss* v. *Dill* (1834), 3 My. & K. 26.

(*f*) *Wilkinson* v. *Wilkinson* (1825), 2 Sim. & St. 237.

(*g*) *Hopkinson* v. *Roe* (1838), 1 Beav. 180.

(*h*) *Henderson* v. *M'Iver* (1818), 3 Madd. 275; *Re Bennett, Jones* v. *Bennett*, [1896] 1 Ch. 778, C. A.

(*i*) *Jones* v. *Powell* (1843), 6 Beav. 488; *Davenport* v. *Powell* (1844), 14 Sim. 275.

(*k*) *Harbin* v. *Darby* (No. 1) (1860), 28 Beav. 325.

(*l*) *Ibid.*

(*m*) Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 39; see, generally, title SOLICITORS.

(*n*) *Johnson* v. *Telford* (1827), 3 Russ. 477; *Allen* v. *Jarvis* (1869), 4 Ch. App. 616. A direction contained in a testator's will that his executors should employ a particular person as solicitor is not binding upon the executors, and does not

SECT. 4. Liability to Account.

Right to indemnity.

762. The representative is further entitled to be indemnified out of the estate in respect of all proper expenses incurred in relation thereto, without any special provision to that effect (*o*). This right of indemnity is a first charge as well upon the income as upon the capital of the estate, and the expenses may be retained out of the income until provision can be made for raising them out of capital (*p*). The charges and expenses include the costs of a probate action respecting the will (*q*), and of actions relating to the estate, which were brought or defended with the leave of the court, or which, though no leave had been obtained, it was proper to bring or defend (*r*). Should the representative desire to have his costs of such actions taxed against the estate, he should obtain an express direction to that effect in the order for the taxation of his costs, charges, and expenses (*s*).

A personal representative who has, without excuse, brought or defended an action will be disallowed as against the estate both his solicitor's bill of costs in the action and the costs he has had to pay to his opponent (*t*).

SECT. 5.—*Admission of Assets.*

What constitutes an admission.

763. An admission of assets may be by express acknowledgment or by conduct. Judgment against an executor by confession or by default or an ordinary common law judgment *de bonis testatoris* is an admission (*a*); the admission by an executor of his indebtedness to the estate at the time of his testator's death is an admission of assets in his hands to the amount of the debt (*b*). Payment of interest for a considerable period on a legacy, as distinguished from a single payment (*c*), amounts to an admission of assets to satisfy the legacy (*d*). Payment of legacy duty will also amount to an admission (*e*), but not where the amount returned on the legacy duty

confer any right on the person named to be employed as solicitor (*Finden* v. *Stephens* (1846), 2 Ph. 142; *Shaw* v. *Lawless* (1858), 15 Cl. & Fin. 129, H. L.; *Foster* v. *Elsley* (1881), 19 Ch. D. 518).

(*o*) *A.-G.* v. *Norwich Corporation* (1837), 2 My. & Cr. 406, 424; Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 24.

(*p*) *Stott* v. *Milne* (1884), 25 Ch. D. 710, C. A.

(*q*) *Re Price, Williams* v. *Jenkins* (1886), 31 Ch. D. 485; *Graham* v. *M'Cashin* [1901] 1 I. R. 404, C. A.

(*r*) *Re Beddoes, Downes* v. *Cottam*, [1893] 1 Ch. 547, C. A.

(*s*) *Payne* v. *Little* (1859), 27 Beav. 83.

(*t*) *Chambers* v. *Smith* (1846), 2 Coll. 742; varied, on another point, *Smith* v. *Chambers* (1847), 2 Ph. 81.

(*a*) *Rock* v. *Leighton* (1700), 1 Salk. 310; *Skelton* v. *Hawling* (1750), 1 Wils. 258; *Re Marvin, Crawter* v. *Marvin*, [1905] 2 Ch. 490; *Thompson & Sons* v. *Clarke* (1901), 17 T. L. R. 455.

(*b*) *Rothwell* v. *Rothwell* (1825), 2 Sim. & St. 217, 218; *Richardson* v. *Bank of England* (1838), 4 My. & Cr. 165, 174.

(*c*) *Corporation of Clergymen's Sons* v. *Swainson* (1748), 1 Ves. Sen. 75; *A.-G.* v. *Chapman* (1840), 3 Beav. 255; *Whittle* v. *Henning* (1840), 2 Beav. 396; *A.-G.* v. *Higham* (1843), 2 Y. & C. Ch. Cas. 634; *Brewster* v. *Prior* (1886), 35 W. R. 251; *Parry* v. *Huddleton* (1854), 18 Jur. 992.

(*d*) Payment of interest on a specific or demonstrative legacy does not amount to an admission of general assets (*Severs* v. *Severs* (1853), 1 Sm. & G. 400).

(*e*) *Lazonby* v. *Rawson* (1854), 4 De G. M. & G. 556; *Whittle* v. *Henning*, *supra*.

account is returned merely as the estimated value of the legacy (*f*). Crediting the legatee with the amount of his legacy in the books of a business in which the testator was a partner is a sufficient admission where the will contains no power to employ the assets in the business (*g*); but not where there is a direction that the legacies are to remain in the business (*h*). Part payment of a legacy on account is not an admission of assets to pay in full (*i*).

The admission of assets for payment of a legacy covers the costs of an action to recover the legacy (*k*).

Submission to arbitration.

764. A submission to arbitration of a claim against the estate is in general considered as a reference not only of the matters in dispute, but also of the question whether the representative has assets, and an award by the arbitrator that the representative is to pay a sum of money is equivalent to determining that he has assets to pay the amount (*l*).

Extent of admission.

765. Though it is very old law that the payment of one legacy is an admission of assets for every other legatee (*m*), the court now endeavours to deal fairly with each case, and not by a mere unintentional admission of assets by executors to subject them to liabilities which they never contemplated or meant to undertake (*n*). Thus, if an executor choose on his own responsibility, without reference to the state of the assets, to pay small legacies given to servants, it would be hard to say that he had thereby conclusively bound himself to pay all the legacies given by the will (*o*), and an executor who had made a payment to one legatee, which was warranted by the existing state of the assets, would not be precluded from setting up against the other legatees a subsequent depreciation in value of the estate (*p*).

Even as against creditors, the payment of a legacy is not of itself such an admission of assets to pay debts as to disentitle the executor from explaining the circumstances under which the payment was made (*q*), nor will payment of interest on a debt amount to an admission of assets for payment of the principal (*r*).

Effect of admission.

766. Though an admission cannot be retracted unless a case of mistake is clearly made out (*s*), it is susceptible of explanation (*t*),

(*f*) *Hutton* v. *Rossiter* (1855), 7 De G. M. & G. 9, C. A.
(*g*) *Townend* v. *Townend* (1859), 1 Giff. 201.
(*h*) *Hutton* v. *Rossiter*, *supra*.
(*i*) *Smith* v. *Stothard* (1837), 1 Jur. 540.
(*k*) *Philanthropic Society* v. *Hobson* (1833), 2 My. & K. 357.
(*l*) *Re Wansborough*, *Wansborough* v. *Dyer* (1818), 2 Chit. 40; and see title ARBITRATION, Vol. I., p. 443, note (*d*), and the cases there cited.
(*m*) *Cook* v. *Martyn* (1737), 2 Atk. 2, *per* Lord HARDWICKE, at p. 3.
(*n*) *Morewood* v. *Currey* (1879), 28 W. R. 213, *per* HALL, V.-C., at p. 215; *Postlethwaite* v. *Mounsey* (1842), 6 Hare, 33, n.; *Cadbury* v. *Smith* (1869), L. R. 9 Eq. 37.
(*o*) *Postlethwaite* v. *Mounsey*, *supra*, *per* WIGRAM, V.-C., at p. 35.
(*p*) *Re Schneider*, *Kirby* v. *Schneider* (1906), 22 T. L. R. 223.
(*q*) *Savage* v. *Lane* (1847), 6 Hare, 32.
(*r*) *Cleverly* v. *Brett* (1772), 5 Term Rep. 8, n.
(*s*) *Drewry* v. *Thacker* (1819), 3 Swan. 529, 548.
(*t*) *Payne* v. *Tanner* (1886), 55 L. J. (CH.) 611, 613; *Brewster* v. *Prior* (1886), 35 W. R. 251, 252; *Inge* v. *Kenny* (1845), 4 Hare, 452.

SECT. 5. Admission of Assets.

and must be taken to have reference to the circumstances with which the representative was at the time acquainted, and if the circumstances on which he based his admission fail, the admission fails also (*a*).

Personal judgment against representative.

On admission of assets an immediate personal judgment may be made against the representative (*b*), whether the claim be by a creditor or a legatee (*c*), and though the creditor sue on behalf of himself and all other creditors (*d*). An admission of assets by one executor does not preclude a creditor from requiring the other executors to account (*e*). An admission of assets to pay a debt covers the interest on the debt (*f*).

By admitting assets the executor of an executor renders himself liable to the same judgment as that to which the original executor would himself, if living, have been liable (*g*).

SECT. 6.—*Right of Set-off.*

Right of set-off a statutory right.

767. The right of set-off is a purely statutory right (*h*) enabling a person who is sued for a sum of money to defend himself by claiming a debt due to himself from the plaintiff in satisfaction or reduction of the debt for which he is sued (*i*); it is expressly made applicable to the case of an action by or against an executor or administrator, where there are mutual debts between the testator or intestate and the other party (*k*).

When set-off arises.

In order to give the right of set-off the debts must be between the same parties in the same right. Thus, in an action by the plaintiff as executor, the defendant cannot set off a debt due to him from the executor personally (*l*), nor can a defendant sued as executor set off a debt due to himself personally (*m*). So, too, an

(*a*) *Horsley* v. *Chaloner* (1750), 2 Ves. Sen. 83, 85; *Payne* v. *Little* (1856), 22 Beav. 69; *Clark* v. *Bates* (1848), 2 De G. & Sm. 203.

(*b*) *Horsley* v. *Chaloner*, *supra*; *Say* v. *Creed* (1844), 3 Hare, 455, 459; *Barnard* v. *Pumfrett* (1841), 5 My. & Cr. 63; *Rogers* v. *Soutten* (1838), 7 L. J. (CH.) 118; *Gordon* v. *Scott* (1844), 3 Hare, 459, n.; *Lincoln* v. *Wright* (1841), 4 Beav. 427.

(*c*) *Jeffs* v. *Wood* (1723), 2 P. Wms. 128, 131.

(*d*) *Woodgate* v. *Field* (1842), 2 Hare, 211.

(*e*) *Norton* v. *Turvill* (1723), 2 P. Wms. 144.

(*f*) *Foster* v. *Foster* (1789), 2 Bro. C. C. 616; *Tew* v. *Winterton* (*Earl*), *Forster* v. *Forster* (1792), 2 Ves. 451, commented upon, 4 Ves. 606.

(*g*) *Davenport* v. *Stafford* (1852), 2 De G. M. & G. 901, C. A.

(*h*) *Re Gregson, Christison* v. *Bolam* (1887), 36 Ch. D. 223, *per* NORTH, J., at p. 226. The statutes creating the right are 2 Geo. 2, c. 22, and 8 Geo. 2, c. 24. These statutes have been repealed by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59), s. 2, and the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), s. 4, but the right created by the original statutes is not affected (see s. 4 of the former Act and s. 5 of the latter Act; see also R. S. C., Ord. 19, r. 3, title EQUITY, Vol. XIII., p. 161; and generally title SET-OFF AND COUNTERCLAIM).

(*i*) *Williams* v. *North's Navigation Collieries* (1889), *Ltd.*, [1906] A. C. 136, *per* Lord DAVEY, at p. 141.

(*k*) See stat. (1728) 2 Geo. 2, c. 22, s. 13.

(*l*) *Hutchinson* v. *Sturges* (1741), Willes, 261, 263; see also *Phillips* v. *Howell*, [1901] 2 Ch. 773.

(*m*) *Gale* v. *Luttrell* (1826), 1 Y. & J. 180.

SECT. 6. Right of Set-off.

executor who is sued for a personal debt cannot set off a debt owing by the plaintiff to the estate (*n*).

Both debts must arise either before or after the death.

768. The principle is so strictly applied that to a claim by an executor for a debt accrued due to the estate subsequent to the death the defendant cannot set off a debt due to himself from the testator in his lifetime (*o*), nor can a person who is sued for a debt owing to the deceased in his lifetime set off a debt which accrued due from the estate subsequent to the death (*p*). Similarly an executor who is sued for a debt accrued due from the testator in his lifetime cannot set off a debt accrued due to the estate since the death of the testator (*q*). But an account stated by an executor in respect of dealings between his testator and another person must be taken to show a debt due from the testator to that other person, and against this a debt due from the latter to the testator may be set off (*r*).

Where representative both debtor and creditor.

There is no principle which requires a different rule as to set-off to be applied in equity (*s*) from that to be applied at law, but where the representative, having discharged all the liabilities of the estate, has, as sole next of kin or residuary legatee, become legally and equitably the absolute owner of a debt due to his testator, the debtor may against a claim for the debt, though made by the representative in his representative capacity, set off a debt due from the representative personally (*t*). This equitable exception is not, however, to be extended to a case in which administration accounts require to be taken in order to show that the representative is the beneficial owner of the debt (*a*).

Set-off against claim of next of kin.

769. To a claim in administration proceedings for a sum due in respect of a share of the intestate's estate, the administrator may set off a debt due to himself personally from the next of kin (*b*), notwithstanding that the share has been paid into court (*c*) or has been assigned by the next of kin (*d*), or that the debt is statute barred (*e*).

(*n*) *Bishop* v. *Church* (1748), 3 Atk. 691; *Gale* v. *Luttrell* (1826), 1 Y. & J. 180; *Nelson* v. *Roberts* (1893), 69 L. T. 352.

(*o*) *Shipman* v. *Thompson* (1738), Willes, 103; *Schofield* v. *Corbett* (1836), 11 Q. B. 779; *Rees* v. *Watts* (1855), 11 Exch. 410; overruling *Mardall* v. *Thelluson* (1852), 21 L. J. (Q. B.) 410; *Hallett* v. *Hallett* (1879), 13 Ch. D. 232; *Re Gregson, Christison* v. *Bolam* (1887), 36 Ch. D. 223; *Re Gedney, Smith* v. *Grummitt*, [1908] 1 Ch. 804, 810.

(*p*) *Newell* v. *National Provincial Bank of England* (1876), 1 C. P. D. 496; see also *Allison* v. *Smith* (1869), 10 B. & S. 747; *Lambarde* v. *Older* (1853), 17 Beav. 542.

(*q*) *Rees* v. *Watts*, *supra*, at p. 416.

(*r*) *Blakesley* v. *Smallwood* (1846), 8 Q. B. 538, as explained in *Rees* v. *Watts*, *supra*.

(*s*) *Newell* v. *National Provincial Bank of England*, *supra*, *per* LINDLEY, J., at p. 504.

(*t*) *Jones* v. *Mossop* (1844), 3 Hare, 568.

(*a*) *Re Willis, Percival & Co., Ex parte Morier* (1879), 12 Ch. D. 491, C. A.; explaining *Bailey* v. *Finch* (1871), L. R. 7 Q. B. 34.

(*b*) *Taylor* v. *Taylor* (1875), L. R. 20 Eq. 155.

(*c*) *Ibid.*

(*d*) *Re Jones, Christmas* v. *Jones*, [1897] 2 Ch. 190. For the right of an executor to set off against a legacy costs which have been ordered to be paid to him by the legatee in probate proceedings, see *Re Knapman, Knapman* v. *Wreford* (1881), 18 Ch. D. 300, C. A.

(*e*) *Re Cordwell's Estate, White* v. *Cordwell* (1875), L. R. 20 Eq. 644.

SECT. 6. Right of Set-off.

Unliquidated claims.

770. It would appear that an unliquidated claim stands on the same footing for the purpose of set-off as a liquidated claim (*f*), but a money claim cannot be set off against a claim for property (*g*). The rule that the debts must be between the same parties and in the same right applies equally to a counterclaim as to a set-off (*h*).

SECT. 7.—*Actions by and against the Representative.*

Indorsement on writ.

771. Where a person sues or is sued in a representative capacity, the fact must appear on the indorsement on the writ of summons (*i*).

Beneficiaries need not be joined.

Executors and administrators may sue and be sued on behalf of or as representing the estate of which they are representatives without joining any persons beneficially interested in the estate; the rule applies to executors and administrators sued in proceedings to enforce a security whether by foreclosure or otherwise (*k*).

Joinder of representative and personal claims.

772. Claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided that the personal claims are alleged to arise with reference to the estate of which the executor or administrator is the representative (*l*). The court has power, where the claims cannot be conveniently tried together, to order separate trials (*m*), or to confine the action to such of the claims as can be conveniently disposed of together (*n*).

If either party wishes to deny the right of any other party to claim in a representative capacity, he must do so specifically (*o*).

Costs.

773. In ordinary cases an executor or administrator, who sues as such and fails, is personally liable for the costs of the action (*p*), and unless the defendant has been guilty of some misconduct inducing the plaintiff to bring the action (*q*) the judgment against him will be that the defendant recover the costs to be levied *de bonis propriis* (*r*).

Defences.

774. The personal representative may in general plead in answer to an action brought against him in his representative capacity any defence which would have been open to the deceased.

(*f*) R. S. C., Ord. 19, r. 3; *Bankes* v. *Jarvis*, [1903] 1 K. B. 549; see also title SET-OFF AND COUNTERCLAIM.

(*g*) *Eberle's Hotels and Restaurant Co.* v. *Jonas* (1887), 18 Q. B. D. 459, C. A.; *Lord* (*Trustee*) v. *Great Eastern Railway*, [1908] 2 K. B. 54, 78, C. A.

(*h*) *Macdonald* v. *Carington* (1878), 4 C. P. D. 28. For an instance of counterclaim, see *Watkin* v. *Newcomen* (1883), Cab. & El. 113.

(*i*) R. S. C., Ord. 3, r. 4.

(*k*) *Ibid.*, Ord. 16, r. 8.

(*l*) *Ibid.*, Ord. 18, r. 5. For the object of this rule, see *Padwick* v. *Scott*, *Re Scott's Estate*, *Scott* v. *Padwick* (1876), 2 Ch. D. 736, 743.

(*m*) R. S. C., Ord. 18, r. 1.

(*n*) *Ibid.*, rr. 8, 9.

(*o*) *Ibid.*, Ord. 21, r. 5.

(*p*) *Boynton* v. *Boynton* (1878), 4 App. Cas. 733.

(*q*) *Godson* v. *Freeman* (1835), 2 Cr. M. & R. 585; *Farley* v. *Briant* (1835), 3 Ad. & El. 839; *Birkhead* v. *North* (1847), 4 Dow. & L. 732; *Redmayne* v. *Moore* (1856), 2 Jur. (N. S.) 691.

(*r*) *Ashton* v. *Poynter* (1835), 1 Cr. M. & R. 738; *Southgate* v. *Crowley* (1835), 1 Bing. (N. C.) 518.

He may further rely upon any of the following defences—namely, (1) that he was never executor or administrator; (2) that he has fully administered, or fully administered with the exception of certain assets; and (3) the existence of debts of a higher nature and no assets *ultra* (*s*).

Plea of *plene administravit*.

775. If the defence of *plene administravit* or *plene administravit præter* be pleaded, the burden of proving assets rests upon the plaintiff (*t*), and the representative is only answerable to the amount of assets proved (*a*). The amount of the duty paid by the executor upon obtaining probate is admissible in evidence upon the issue of *plene administravit* (*b*), but it is not *primâ facie* evidence of the amount of assets which have come to his hands (*c*).

Judgment against assets *in futuro*.

If the representative pleads *plene administravit* or *plene administravit præter* and no other defence, or no other defence except that of outstanding claims of a higher nature and no assets *ultra*, the plaintiff may either join issue, or, if he is willing to admit the truth of the plea, may apply for leave to sign judgment for his claim and costs against assets *in futuro*, or judgment as to part of his claim against assets acknowledged, and as to the residue of his claim and costs against assets *in futuro* (*d*). In the latter case costs are not awarded against the representative personally, nor does he get his costs (*e*). Where a party is entitled to execution upon a judgment of assets *in futuro* he may apply for leave to issue execution against assets subsequently falling in (*f*).

Where plaintiff fails on issue.

If issue is joined upon the plea of *plene administravit* and the plaintiff fails upon that issue, he may enter judgment against assets *in futuro*, but must pay the general costs of the representative, even though the latter may have raised other defences in which he has not succeeded (*g*).

Where plaintiff succeeds on claim only.

776. If the plaintiff admits the defence of *plene administravit* and the action goes to trial on the claim only and the plaintiff succeeds as to that, he will get judgment of assets *in futuro* as to

(*s*) These defences should be specifically pleaded, see R. S. C., Ord. 19, rr. 13, 15, and Ord. 21, r. 5. The representative may plead both *ne unques executor* and *plene administravit* (*Tyson* v. *Kendall* (1850), 19 L. J. (Q. B.) 434).

(*t*) *Giles* v. *Dyson* (1815), 1 Stark. 32.

(*a*) *Erving* v. *Peters* (1790), 3 Term Rep. 685, *per* Lord KENYON, C.J., at p. 688.

(*b*) *Mann* v. *Lang* (1835), 3 Ad. & El. 699.

(*c*) *Stearn* v. *Mills* (1833), 4 B. & Ad. 657, dissenting from *Foster* v. *Blakelock* (1826), 5 B. & C. 328; *Mann* v. *Lang*, *supra*; *Lazonby* v. *Rawson* (1854), 4 De G. M. & G. 556.

(*d*) See R. S. C., Ord. 32, r. 6. For form of judgment, see Chitty's King's Bench Forms, 13th ed., Form 12, p. 552.

(*e*) *Cockle* v. *Treacy*, [1896] 2 I. R. 267, C. A., *per* WALKER, C., at p. 270; *Smith* v. *Tateham* (1848), 2 Exch. 205; *De Tastet* v. *Andrade* (1817), 1 Chit. 629, n.

(*f*) R. S. C., Ord. 42, r. 23. Before applying for leave to issue execution the judgment creditor should make a demand upon the representative; see R. S. C., Ord. 42, r. 9.

(*g*) *Millar & Co.* v. *Keane* (1889), 24 L. R. Ir. 49; approved, *Cockle* v. *Treacy*, *supra*; *Iggulden* v. *Terson* (1833), 2 Dowl. 277; *Hogg* v. *Graham* (1811), 4 Taunt. 135; *Ragg* v. *Wells* (1817), 8 Taunt. 129; *Edwards* v. *Bethel* (1818), 1 B. & Ald. 254; *Cockson* v. *Drinkwater* (1783), 3 Doug. (K. B.) 239; *Lucas* v. *Jenner* (1833), 1 Cr. & M. 597.

SECT. 7. Actions by and against the Representative.

the debt, and as to the costs *de bonis testatoris et si non de bonis propriis* (*h*).

Where the representative pleads a denial of the claim and *plene administravit præter* (as distinguished from *plene administravit*) and fails on the former, he must pay the costs though he succeeds on the latter plea (*i*).

Where representative fails.

777. Where the representative fails upon the issue of *plene administravit* the plaintiff obtains judgment for his debt and costs to be levied of the goods and chattels of the deceased, and in case of deficiency for his costs to be levied out of the proper goods and chattels of the representative (*k*). If, upon the issue of *plene administravit*, it appears that the representative has been guilty of a *devastavit*, which has caused a failure of assets, the jury must find that he has assets to that amount, and not find a *devastavit* (*l*). Where the action is brought against several representatives, all of whom plead *plene administravit*, and the plaintiff proves assets in the hands of some only of the defendants, judgment should be entered in favour of the other defendants (*m*).

Judgment by default.

778. If the representative allows judgment to go against him by default, or fails to plead *plene administravit*, he admits the claim and that he has sufficient assets to satisfy it (*n*), but that does not justify the plaintiff in signing a personal judgment against him (*o*).

Remedy of plaintiff after judgment.

779. Upon judgment the plaintiff may sue out a writ of *fieri facias de bonis testatoris*; if there are no goods of the deceased the sheriff may return either *nulla bona* simply or *nulla bona* and a *devastavit* (*p*). In the case of a return of *nulla bona* simply, the plaintiff can bring proceedings against the representative personally, founded upon the original judgment, the writ of *fieri facias*, and the return, and suggesting a *devastavit* (*q*). Upon a return of *nulla bona* and a *devastavit*, the plaintiff may apply for leave to issue execution against the representative personally.

(*h*) *Marshall* v. *Wilder* (1829), 9 B. & C. 655.

(*i*) *Squire* v. *Arnison* (1884), Cab. & El. 365.

(*k*) Chitty's King's Bench Forms, 13th ed., Form 18, p. 555; *Gorton* v. *Gregory* (1882), 3 B. & S. 90. The form is still in ordinary practice confined to the goods and chattels of the deceased notwithstanding that the real estate is now by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1 (4), vested in the representative. The form ought, it is submitted, to be extended, so as to include all the estate, both real and personal, vested in the representative.

(*l*) Went. Off. Ex., 14th ed., 312.

(*m*) *Parsons* v. *Hancock* (1829), Mood. & M. 330; *Cousins* v. *Paddon* (1835), 2 Cr. M. & R. 547, 558.

(*n*) *Rock* v. *Leighton* (1700), 1 Salk. 310; *Ramsden* v. *Jackson* (1737), 1 Atk. 292, 294; *Leonard* v. *Simpson* (1835), 2 Bing. (N. C.) 176; *Palmer* v. *Waller* (1836), 1 M. & W. 689; *Thompson & Sons* v. *Clarke* (1901), 17 T. L. R. 455; *Re Marvin, Crawter* v. *Marvin*, [1905] 2 Ch. 490.

(*o*) *Skelton* v. *Hawling* (1750), 1 Wils. 258; *Erving* v. *Peters* (1790), 3 Term Rep. 685. Form No. 9 in Chitty's King's Bench Forms, 13th ed., p. 551, is incorrect, and the judgment in *Re Higgins's Trusts* (1861), 2 Giff. 562, cannot be supported except as to costs.

(*p*) Note (8) to *Wheatley* v. *Lane* (1669), 1 Wms. Saund. 216 a; see also title EXECUTION, p. 15, *ante*.

(*q*) *Ibid.*; see also *Lacons* v. *Warmoll*, [1907] 2 K. B. 350, C. A., *per* Lord ALVERSTONE, C.J., at p. 360.

Formerly the plaintiff might immediately upon the return sue out execution *de bonis propriis* (*r*). The modern practice does not appear to be definitely settled, but it would seem to be the better course to apply for leave to issue execution *de bonis propriis* (*s*).

Representatives answer to personal claim.

780. Inasmuch as the original judgment against the representative *de bonis testatoris* amounts to a finding that he has assets in his hands to satisfy the judgment, the only answer to a personal claim against himself founded upon the judgment is that there were goods of the deceased which might have been taken in execution, and that he showed them to the sheriff (*t*).

County court proceedings.

781. Where the action is brought against the representative in the county court, the plaintiff may charge in his summons that the representative has had assets and has wasted them (*u*), and the form of judgment, where the county court judge finds that there has been a *devastavit*, is *de bonis testatoris et si non de bonis propriis* (*v*).

Representative of married woman.

782. The legal personal representative of a married woman has in respect of her separate estate the same rights and liabilities, and is subject to the same jurisdiction, as she would be if she were living (*w*). Accordingly judgment against her legal personal representative must be confined to her separate property which she was not restrained from anticipating (*x*).

Part VII.—Administration by the Court.

SECT. 1.—*The Jurisdiction.*

Administration. Chancery Division. County court.

783. The administration of estates of deceased persons by the High Court is assigned to the Chancery Division (*a*). County courts have concurrent jurisdiction with the High Court where the estate sought to be administered does not exceed in amount or value the sum of £500 (*b*). Their jurisdiction also extends to the recovery of a distributive share under an intestacy or a legacy under a will not exceeding the sum of £100 (*c*). A judge of the

(*r*) See note (8) to *Wheatley* v. *Lane* (1669), 1 Wms. Saund. 216 a.

(*s*) See Chitty's King's Bench Forms, 13th ed., p. 557, Form 22, and *ibid.*, note (b), p. 422.

(*t*) See note (8) to *Wheatley* v. *Lane*, *supra*; *Leonard* v. *Simpson* (1835), 2 Bing. (N. C.) 176, 179, 180; *Dawson* v. *Gregory* (1845), 7 Q. B. 756.

(*u*) County Court Rules, 1903, Ord. 30, r. 3.

(*v*) *Ibid.*, Ord. 30, r. 4, and Form 238.

(*w*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 23. For the liabilities of a married woman, see title HUSBAND AND WIFE.

(*x*) *Surman* v. *Wharton*, [1891] 1 Q. B. 491. For form of judgment against a married woman, see *Scott* v. *Morley* (1887), 20 Q. B. D. 120, 132, C. A. A husband who has taken possession of his wife's chattel real interests *jure mariti*, without a grant of administration, becomes her legal personal representative within the meaning of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 23; see *Surman* v. *Wharton*, *supra*.

(*a*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34 (3).

(*b*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 67; see also title COUNTY COURTS, Vol. VIII., pp. 443—445.

(*c*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 58, as extended by

SECT. 1. The Jurisdiction.

Chancery Division has power upon the application of any of the parties to an action in the High Court, or without such application if he thinks fit, to order a transfer to the county court of an action which might have been commenced in the latter court (*d*).

Administration proceedings.

784. Proceedings for administration may be commenced either by writ of summons or by originating summons (*e*). A proceeding by which trustees are charged with a breach of trust should not be brought by originating summons (*f*), nor is an originating summons the proper way to deal with a matter which involves a dispute of facts (*g*) or the setting aside of a release (*h*).

Appointment of receiver.

The court has jurisdiction in proceedings commenced by originating summons to appoint a receiver (*i*).

Service out of jurisdiction.

785. Service out of the jurisdiction of a writ may be allowed where the action is for the administration of the personal estate of a deceased person, who at the time of his death was domiciled within the jurisdiction (*k*), or where one of several representatives of a person who died domiciled out of the jurisdiction has in an action properly brought against him been duly served within the jurisdiction (*l*). Where leave is asked to serve the writ in Scotland or Ireland, the court must, where there is a concurrent remedy in Scotland or Ireland, have regard to the comparative cost and convenience of proceeding in England (*m*). The court has power to order service of an originating summons in a foreign country (*n*).

Determination of questions without administration.

786. Provision is made (*o*) for the determination on originating summons, without administration of the estate, of any of the following matters:—(a) Any question affecting the rights or interests of a person claiming to be creditor, devisee, legatee, next of kin, heir-at-law, or *cestui que trust;* (b) the ascertainment of any class of creditors, legatees, devisees, next of kin, or others; (c) the

County Courts Act, 1903 (3 Edw. 7, c. 42), s. 3; see also s. 5 of the latter Act for power to transfer actions where the claim exceeds £50.

(*d*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 69; see also title COUNTY COURTS, Vol. VIII., p. 447.

(*e*) R. S. C., Ord. 55, r. 4; see, generally, as to writ of summons and originating summons, title PRACTICE AND PROCEDURE.

(*f*) *Re Weall, Andrews* v. *Weall* (1889), 37 W. R. 779, *per* KEKEWICH, J., at p. 780; *Dowse* v. *Gorton*, [1891] A. C. 190, *per* Lord MACNAGHTEN, at p. 202.

(*g*) *Nutter* v. *Holland*, [1894] 3 Ch. 408, C. A., *per* LOPES, L.J., at p. 410; see also *Re Powers, Lindsell* v. *Phillips* (1885), 30 Ch. D. 291, C. A., *per* LINDLEY, L.J., at p. 296.

(*h*) *Re Ellis, Kelson* v. *Ellis* (1888), 59 L. T. 924; see also *Re Garnett, Gandy* v. *Macaulay* (1885), 31 Ch. D. 1, C. A., *per* COTTON, L.J., at p. 12.

(*i*) *Re Francke, Drake & Co.* v. *Francke* (1888), 58 L. T. 305. As to receivers, generally, see title RECEIVERS.

(*k*) R. S. C., Ord. 11, r. 1 (d).

(*l*) *Ibid.*, r. 1 (g); *Re Lane, Lane* v. *Robin* (1886), 55 L. T. 149; *Harvey* v. *Dougherty* (1887), 56 L. T. 322.

(*m*) R. S. C., Ord. 11, r. 2. A similar rule now applies to county court proceedings (see County Court Rules, 1903, Ord. 7, r. 42), thus obviating the questions which were raised in *Wood* v. *Middleton*, [1897] 1 Ch. 151.

(*n*) R. S. C., Ord. 11, r. 8A. The power under this rule is confined to service in a "foreign country," see *Re Busfield, Whaley* v. *Busfield* (1886), 32 Ch. D. 123, C. A.

(*o*) R. S. C., Ord. 55, r. 3.

furnishing of any particular accounts by the executors or administrators, and the vouching (where necessary) of such accounts; (d) the payment into court of any money in the hands of the executors or administrators; (e) directing the executors or administrators to do, or abstain from doing, any particular act in their character as such executors or administrators; (f) the approval of any sale, purchase, compromise, or other transaction; and (g) the determination of any question arising in the administration of the estate or trust.

Representative's powers not interfered with.

787. The issue of a summons under this provision is not to interfere with nor control any power or discretion vested in any executor or administrator, except so far as such interference or control may necessarily be involved in the particular relief sought (*p*).

Jurisdiction.

788. This provision does not confer jurisdiction, but merely regulates the mode in which questions can be brought before the court (*q*), and the court has jurisdiction to determine on originating summons such questions only as it could have determined in an administration action before the rule came into existence (*r*). Thus, unless the parties consent, the court has no jurisdiction on originating summons to determine a question between the representatives and persons claiming adversely to the estate (*s*), between persons claiming under a will and a person claiming adversely to the will (*t*), or between persons claiming as legal devisees under a will (*a*). But where the legal estate is vested in the trustees of the will, and they are in possession of the property, the court can determine on originating summons to whom they ought to hand over the property (*b*).

Objection to jurisdiction.

The objection to the jurisdiction ought to be taken in chambers; if not so taken, the defendant will not be allowed any costs of the adjournment into court (*c*). If not taken in the court of first instance, it cannot be taken in the Court of Appeal (*d*).

Time for appealing.

789. For the purpose of the time limit for appealing, an originating summons falls within the definition of an action (*e*).

SECT. 2.—*The Parties.*

Institution of proceedings.

790. Administration proceedings may be instituted either by the personal representative, creditors, or beneficiaries.

Parties.

The general rule in actions for administration is that all the

(*p*) R. S. C., Ord. 55, r. 12.
(*q*) *Re Turcan* (1888), 58 L. J. (CH.) 101, C. A., *per* COTTON, L.J., at p. 102.
(*r*) *Re Carlyon, Carlyon* v. *Carlyon* (1886), 56 L. J. (CH.) 219.
(*s*) *Re Bridge, Franks* v. *Worth* (1887), 56 L. J. (CH.) 779; *Re Royle, Royle* v. *Hayes* (1889), 43 Ch. D. 18, C. A.
(*t*) *Re Bridge, Franks* v. *Worth, supra;* see the practice adopted in *Re Dillon, Duffin* v. *Dillon* (1890), 44 Ch. D. 76, C.A.
(*a*) *Re Davies* (*William*), *Davies* v. *Davies* (1888), 38 Ch. D. 210.
(*b*) *Re Hargreaves, Midgley* v. *Tatley* (1890), 43 Ch. D. 401, C. A.
(*c*) *Re Davies* (*William*), *Davies* v. *Davies, supra.*
(*d*) *Re Turcan, supra.*
(*e*) *Re Fawsitt, Galland* v. *Burton* (1885), 30 Ch. D. 231, C. A. For time within which to appeal, see title PRACTICE AND PROCEDURE.

SECT. 2. The Parties.

executors who have proved, or all the administrators, must be parties either as plaintiff or defendant (*f*). An executor who has not proved should not be made a party (*g*) unless he has acted as executor (*h*) or intermeddled with the assets (*i*). A judgment for general administration will not be made in the presence only of an administrator *ad litem* (*k*) or of an executor *de son tort* (*l*).

Any executor or administrator entitled thereto may have a judgment or order against any one legatee, next of kin, or *cestui que trust* for the administration of the estate or for the execution of the trusts (*m*).

Where joinder of representatives unnecessary.

791. Where there is no personal estate left unadministered, and the deceased's real estate is not vested in his personal representatives, a creditor may obtain administration of the real estate, without making the personal representatives parties to the proceedings (*n*).

Creditor's action.

792. A creditor may take proceedings for the administration of the personal estate either on his own behalf alone or on behalf of himself and all other creditors (*o*). Where the creditor desired to have the realty administered as well as the personalty, it was held formerly that he must sue on behalf of himself and all other creditors (*p*), except where the realty was devised to trustees who had power to sell and give receipts (*q*). But now, where real assets are by statute (*r*) vested in the personal representatives, it is conceived that the creditor may sue as against such assets on his own behalf alone.

In a creditor's action the personal representatives completely represent the estate, and the residuary legatee should not be made a party (*s*).

Creditor *dominus litis* until judgment.

793. Until judgment the creditor, though suing on behalf of himself and all other creditors, is *dominus litis*, and may deal with

(*f*) *Latch* v. *Latch* (1875), 10 Ch. App. 464; see also *Re Dracup, Field* v. *Dracup*, [1892] W. N. 43; and *Lacons* v. *Warmoll*, [1907] 2 K. B. 350, C. A., *per* BUCKLEY, L.J., at p. 368.

(*g*) *Dyson* v. *Morris* (1842), 1 Hare, 413; *Strickland* v. *Strickland* (1842), 12 Sim. 403.

(*h*) *Vickers* v. *Bell* (1864), 4 De G. J. & Sm. 274, C. A.

(*i*) *Re Lovett, Ambler* v. *Lindsay* (1876), 3 Ch. D. 198.

(*k*) *Dowdeswell* v. *Dowdeswell* (1878), 9 Ch. D. 294, C. A.; see p. 146, *ante*.

(*l*) *Rowsell* v. *Morris* (1873), L. R. 17 Eq. 20; see p. 146, *ante*.

(*m*) R. S. C., Ord. 16, r. 38.

(*n*) *Re Dawson, Clarke* v. *Dawson* (1906), 75 L. J. (CH.) 201.

(*o*) *Re Blount, Naylor* v. *Blount* (1879), 27 W. R. 865; *Re Greaves, Deceased, Bray* v. *Tofield* (1881), 18 Ch. D. 551, 554.

(*p*) *Worraker* v. *Pryer* (1876), 2 Ch. D. 109, dissenting from *Cooper* v. *Blissett* (1876), 1 Ch. D. 691; *Re Royle, Fryer* v. *Royle* (1877), 5 Ch. D. 540; *Re Greaves, Deceased, Bray* v. *Tofield, supra*. Where a creditor is suing in a representative capacity, this fact ought to be shown in the title of the writ and of the statement of claim (*Re Tottenham, Tottenham* v. *Tottenham*, [1896] 1 Ch. 628).

(*q*) *Re McKeown* (1874), 22 W. R. 292; *Wooldridge* v. *Norris* (1868), L. R. 6 Eq. 410.

(*r*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65).

(*s*) *Re Youngs, Doggett* v. *Revett, Re Youngs, Vollum* v. *Revett* (1885), 30 Ch. D. 421, C. A.; *Re Ward, Bemment* v. *Balls* (1878), 47 L. J. (CH.) 781.

the action as he pleases (*a*): but the judgment enures for the benefit of all creditors (*b*), and the plaintiff creditor cannot subsequently thereto accept payment of his debt and allow the action to be dismissed (*c*). A legatee cannot, even with the consent of the creditor, avail himself of the latter's action: he must commence a fresh action (*d*).

Who may appear on creditors' claim.

794. In administration proceedings no party other than the executor or administrator is, without the leave of the court or a judge, entitled to appear, either in court or in chambers, on the claim of any person not a party to the cause or matter against the estate of the deceased person in respect of any debt or liability. The court or a judge may direct or give liberty to any other party to the cause or matter to appear, either in addition to or in place of the executor or administrator, upon such terms as to costs or otherwise as they or he may think fit (*e*).

The representative is also the proper person to sue for outstanding assets, and is entitled, in the absence of misconduct, even after judgment for administration, to the conduct of all proceedings for the benefit of the estate (*f*).

Action of residuary legatee or next of kin.

795. A residuary legatee or next of kin entitled to a judgment or order for the administration of the personal estate of a deceased person may have the same without serving the remaining residuary legatees or next of kin (*g*): a similar rule applies to the case of a person interested in the proceeds of realty (*h*), and to that of a residuary devisee or heir (*i*). A legatee's action is taken to be for himself and the other legatees, whether so expressed or not (*k*).

Service of originating summons.

796. Where an originating summons is taken out by any person other than the executors or administrators it must be served upon them: where it is taken out by an executor or administrator it must, generally speaking, be served upon the persons whose interests are affected by the questions raised (*l*).

Requirements for bringing action.

797. To enable a person to maintain an action he must have an existing interest in the property. The interest may be vested or contingent, future or remote, but it must be an existing interest; a mere possibility is insufficient (*m*). Thus, a member of a class of

(*a*) *Woodgate* v. *Field* (1842), 2 Hare, 211, 214; *Wood* v. *Westall* (1831), You. 305.

(*b*) *Re Greaves, Deceased, Bray* v. *Tofield* (1881), 18 Ch. D. 551.

(*c*) *Handford* v. *Storie* (1825), 2 Sim. & St. 196.

(*d*) *Re Ainsworth, Cockcroft* v. *Sanderson*, [1895] W. N. 153.

(*e*) R. S. C., Ord. 16, r. 47. The judge will not readily, under the general jurisdiction which he has over an action in his own chambers, give liberty to a creditor to attend proceedings generally in an administration action, even at his own expense (*Re Schwabacher, Stern* v. *Schwabacher*, [1907] 1 Ch. 719).

(*f*) *Harrison* v. *Richards* (1866), 1 Ch. App. 473.

(*g*) R. S. C., Ord. 16, r. 33.

(*h*) *Ibid.*, r. 34.

(*i*) *Ibid.*, r. 35.

(*k*) *Re Greaves, Deceased, Bray* v. *Tofield, supra*, at p. 554.

(*l*) R. S. C., Ord. 55, r. 25.

(*m*) *Davis* v. *Angel* (1862), 4 De G. F. & J. 524; *Clowes* v. *Hilliard* (1876), 4 Ch. D. 413.

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possible next of kin of a living person cannot maintain an administration action (*n*), nor need the class be served with the judgment (*o*): but a member of a contingent class, *e.g.*, surviving brothers and sisters of a person who will take if that person dies without leaving issue, has a sufficient interest (*p*). A person whose claim against the estate would not support an action at law against the representatives, as, for instance, a person claiming under an annuity granted by the deceased in respect whereof there are no arrears, is not entitled to an administration order (*a*).

SECT. 3.—*The Judgment or Order.*

Power of court as to order.

798. It is not obligatory upon the court to order administration of the estate where the question between the parties can be properly determined without an administration order (*b*), even though the plaintiff be an infant (*c*), or though the testator has directed his executors to take proceedings to have the estate administered by the court (*d*).

Order for accounts.

Upon an application for administration the court may, where no accounts or insufficient accounts have been rendered, order that the application shall stand over for a certain time, and that the executors or administrators in the meantime shall render a proper statement of their accounts, with an intimation that if this is not done they may be made to pay the costs of the proceedings (*e*).

Administration order subject to conditions.

The court may also, where necessary to prevent proceedings by other creditors or by persons beneficially interested, make the usual order for administration, with a proviso that no proceedings are to be taken under the order without leave of the judge in person (*f*). Nothing short of an order for administration will prevent a creditor from suing the representative, or the representative from preferring creditors (*g*).

Order not limited to assets within jurisdiction.

799. The judgment for the administration of a deceased's personal estate is not limited to assets within the jurisdiction, even where he died domiciled abroad (*h*).

Wilful default of representative.

800. Where wilful default is alleged against the representative, it is sufficient at the trial to establish one instance to entitle the plaintiff to an account on the footing of wilful default (*i*). In taking

(*n*) *Clowes* v. *Hilliard* (1876), 4 Ch. D. 413, commenting upon *Roberts* v. *Roberts* (1848), 2 Ph. 534; *Fussell* v. *Dowding* (1884), 27 Ch. D. 237.
(*o*) *Fowler* v. *James* (1847), 1 Ph. 803.
(*p*) *Peacock* v. *Colling* (1885), 54 L. J. (CH.) 743, C. A.
(*a*) *Re Hargreaves, Dicks* v. *Hare* (1890), 44 Ch. D. 236, C. A.
(*b*) R. S. C., Ord. 55, r. 10. For instances where court has acted under this rule, see *Re Wilson, Alexander* v. *Calder* (1885), 28 Ch. D. 457; *Re Gyhon, Allen* v. *Taylor* (1885), 29 Ch. D. 834, C. A.; *Campbell* v. *Gillespie*, [1900] 1 Ch. 225.
(*c*) *Re Blake, Jones* v. *Blake* (1885), 29 Ch. D. 913, C. A.
(*d*) *Re Stocken, Jones* v. *Hawkins* (1888), 38 Ch. D. 319, C. A.
(*e*) R. S. C., Ord. 55, r. 10A (a).
(*f*) *Ibid.*, Ord. 55, r. 10A (b).
(*g*) *Re Barrett, Whitaker* v. *Barrett* (1889), 43 Ch. D. 70; see, too, *Re Mills, Mills* v. *Mills*, [1884] W. N. 21. As to right of preference, see p. 254, *ante*.
(*h*) *Stirling-Maxwell* v. *Cartwright* (1879), 11 Ch. D. 522, C. A.
(*i*) The rule is that one instance *must* be proved (*Re Youngs, Doggett* v. *Revett, Re Youngs, Vollum* v. *Revett* (1885), 30 Ch. D. 421, *per* COTTON, L.J., at p. 432).

the account under a judgment based on the footing of wilful default, it is open to the plaintiff to go into other instances. In this respect a wilful default action differs from an action brought in respect of active breaches of trust; in the latter case the plaintiff is entitled to relief in respect only of such breaches as he establishes at the trial, and the court will not direct a roving inquiry with a view to ascertaining whether there are any other breaches of trust (*k*).

Where common administration judgment obtained.

801. Where a plaintiff has obtained a common administration judgment against a representative he cannot, in taking the accounts, charge him with wilful default, nor can he maintain a subsequent action against him charging him with wilful default without the leave of the court (*l*). But where in his pleadings he has made an allegation of wilful default, and the claim to relief in respect thereof has not been dismissed, the court can, even after a common administration judgment, at any subsequent stage of the proceedings, if evidence of wilful default is adduced, direct further accounts to be taken on that footing (*m*).

Liability on a common account.

802. Where the account directed by the order is what is called a common account, the representative is bound not only to bring in an account of his receipts, but to discharge himself as regards those receipts, and show what he has done with the money received; and in taking the account disbursements made by him in breach of his fiduciary duties will be disallowed (*n*).

Order to lodge money in court.

803. A representative, though not shown to be insolvent or to have abused his trust, may be ordered to lodge in court a sum of money found due from him on taking his accounts, or admitted to be in his hands (*o*), or in the hands of his firm (*p*), or to be due to the estate from him (*q*). The money need not be in his possession at the date of the order; it is sufficient if he is proved to have received it and never to have discharged himself of it (*r*). But it must be

(*k*) *Re Wrightson, Wrightson* v. *Cooke*, [1908] 1 Ch. 789, explaining and distinguishing *Job* v. *Job* (1877), 6 Ch. D. 562; *Mayer* v. *Murray* (1878), 8 Ch. D. 424; *Re Symons, Luke* v. *Tonkin* (1882), 21 Ch. D. 757; *Smith* v. *Armitage* (1883), 24 Ch. D. 727; and see title TRUSTS AND TRUSTEES.

(*l*) *Laming* v. *Gee* (1878), 10 Ch. D. 715. Leave of the court may be given without requiring proof that the information on which the fresh action is founded was not acquired in time to be utilised in the former action (*Re Kurtz, Emerson* v. *Henderson* (1904), 90 L. T. 12; see also *Re Hoghton's Estate, Hoghton* v. *Fiddey* (1874), 43 L J. (CH.) 758.

(*m*) *Re Symons, Luke* v. *Tonkin, supra;* see also *Edmonds* v. *Robinson* (1885), 29 Ch. D. 170, *per* KAY, J., at p. 175.

(*n*) *Re Stuart, Smith* v. *Stuart* (1896), 74 L. T. 546; *Re Newland, Bush* v. *Summers*, [1904] W. N. 181. To this extent, accordingly, a breach of trust can be gone into in proceedings commenced by originating summons. In taking an account all just allowances are to be made without any direction for that purpose (R. S. C., Ord. 33, r. 8).

(*o*) *Strange* v. *Harris* (1791), 3 Bro. C. C. 365.

(*p*) *Johnson* v. *Aston* (1822), 1 Sim. & St. 73.

(*q*) *Rothwell* v. *Rothwell* (1825), 2 Sim. & St. 217. A representative ordered to pay money into court is not thereby deprived of his lien on the fund for his costs (*Blenkinsop* v. *Foster* (1838), 3 Y. & C. (EX.) 205).

(*r*) *Middleton* v. *Chichester* (1871), 6 Ch. App. 152.

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shown that the money is or has been in the actual, and not merely in the constructive, possession or control of the representative; the master's certificate finding a balance due is not of itself sufficient evidence of the actual possession or control (*s*).

When order for lodging money in court should be made.

The court ought not, upon an interlocutory application, to order a representative to pay money into court except where it is made out to the satisfaction of the court that he has the sum claimed in his hands (*t*) or under his control (*a*); nor ought the court, upon an application by originating summons (*b*), to order a representative to pay money into court unless it is actually in his hands; it is not sufficient that it has been in his hands and that he is responsible for it (*c*).

Enforcement of order by attachment.

An order for payment by a representative of money into court may be enforced by attachment and imprisonment not exceeding one year (*d*), but the court has a discretion to refuse the attachment (*e*). Attachment will not issue for failure by a representative to pay into court an amount to be verified by affidavit (*f*), or interest upon a sum with which he has been charged (*g*), or, in the absence of improper conduct, a debt due from himself to the deceased (*h*).

By sequestration.

The order may also be enforced by a writ of sequestration against the estate and effects of the representative (*i*). The person obtaining the writ is not a judgment creditor of the representative, and the court has no jurisdiction under the writ to direct a sale of the representative's real estate (*k*).

Order against married woman.

804. Where a married woman representative is shown to have money belonging to the estate in her hands, the order against her should be in the usual form to pay it into court, and should not be restricted to payment out of her separate estate; in default of compliance with the order, a writ of attachment may issue against her (*l*).

(*s*) *Re Fewster, Herdman* v. *Fewster*, [1901] 1 Ch. 447; *Re Wilkins, Emsley* v. *Wilkins*, [1901] W. N. 202.

(*t*) *Neville* v. *Matthewman*, [1894] 3 Ch. 345, C. A., commenting upon *Freeman* v. *Cox* (1878), 8 Ch. D. 148; *Crompton and Evans' Union Bank* v. *Burton*, [1895] 2 Ch. 711.

(*a*) *Re Benson, Elletson* v. *Pillers*, [1899] 1 Ch. 39.

(*b*) See R. S. C., Ord. 55, r. 3 (d).

(*c*) *Nutter* v. *Holland*, [1894] 3 Ch. 408, C. A., disapproving *Re Chapman, Fardell* v. *Chapman* (1886), 54 L. T. 13.

(*d*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4.

(*e*) Debtors Act, 1878 (41 & 42 Vict. c. 54), s. 1. The object of the Debtors Act, 1869 (32 & 33 Vict. c. 62), was to punish fraudulent or dishonest debtors, and the Act is in that sense vindictive; see title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., p. 299, note (*g*), and cases there cited.

(*f*) *Re Spicer, Spicer* v. *Spicer*, [1881] W. N. 85.

(*g*) *Middleton* v. *Chichester* (1871), 6 Ch. App. 152; *Re Hickey, Hickey* v. *Colmer* (1886), 35 W. R. 53.

(*h*) *Re Woodward, Woodward* v. *Woodward* (1886), 30 Sol. Jo. 753; *Re Bourne, Davey* v. *Bourne*, [1906] 1 Ch. 697, C. A.

(*i*) R. S. C., Ord. 43, r. 6.

(*k*) *Johnson* v. *Burgess* (1873), L. R. 15 Eq. 398; *Pratt* v. *Inman* (1889), 43 Ch. D. 175, 180. For the effect of writs of sequestration, see title EXECUTION, p. 81, *ante*.

(*l*) *Re Turnbull, Turnbull* v. *Nicholas*, [1900] 1 Ch. 180; see also title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., p. 300.

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805. A judgment for the recovery from the defendant of a sum of money, as distinguished from an order to pay a sum of money into court, cannot be supplemented by an order fixing the time for the payment by him of the sum of money, even in the case where the defendant stands in a fiduciary position (*m*). Fixing time for payment.

806. After a judgment for administration the representative is not entitled to do any act which affects the relative rights of creditors (*n*). He cannot, accordingly, pay one creditor in preference to another (*o*), nor give a creditor a valid acknowledgment of a debt so as to take it out of the Statutes of Limitation (*p*). The judgment does not, however, determine his right of retainer (*q*). After judgment he can only exercise his powers of management subject to the control of the court (*r*); but the judgment does not, where no receiver has been appointed or injunction granted, deprive him of his legal powers to deal with the assets so as to invalidate the title of persons claiming under a disposition made by him in exercise of his legal powers (*s*). Effect of judgment. Upon powers of representative.

807. A judgment for administration prevents time from running against the claims of all creditors coming in under the judgment (*t*), but the mere institution of administration proceedings is not sufficient to effect this (*u*). Upon claims of creditors.

808. As a rule of prudence the courts usually prefer that the evidence of a claimant against the deceased's estate, whether in respect of a gift or a debt, should be supported by something more than the uncorroborated testimony of the claimant (*v*). But there is no rule of law requiring such uncorroborated evidence to be rejected, and the court will rely solely on such evidence if it is believed (*w*). Evidence of claims.

809. A creditor of whatever nationality is entitled, in the administration of assets in this country, to be paid equally with Foreign creditor.

(*m*) *Re Oddy, Major* v. *Harness*, [1906] 1 Ch. 93, C. A.; *Drewett* v. *Edwards* (1877), 37 L. T. 622, C. A.; *Hulbert and Crowe* v. *Cathcart*, [1894] 1 Q. B. 244.

(*n*) *Shewen* v. *Vanderhorst* (1830), 2 Russ. & M. 75.

(*o*) See p. 254, *ante*. A creditor who has obtained payment of part of his debt, prior to the administration order, will not receive any further payment until all the other creditors are paid proportionably (*Mitchelson* v. *Piper* (1836), 8 Sim. 64).

(*p*) *Phillips* v. *Beal* (No. 2) (1862), 32 Beav. 26.

(*q*) See p. 256, *ante*.

(*r*) *Widdowson* v. *Duck* (1817), 2 Mer. 494, 499; *Bethell* v. *Abraham* (1873), L. R. 17 Eq. 24; *Minors* v. *Battison* (1876), 1 App. Cas. 428. For the effect upon the discretionary powers of executor-trustees of a judgment for the execution of the trusts of a will, see title TRUSTS AND TRUSTEES.

(*s*) *Berry* v. *Gibbons* (1873), 8 Ch. App. 747; *Lonergan* v. *Hoban*, [1896] 1 I. R. 401.

(*t*) *Re Greaves, Deceased, Bray* v. *Tofield* (1881), 18 Ch. D. 551.

(*u*) *Ibid.*, commenting upon *Sterndale* v. *Hankinson* (1827), 1 Sim. 393.

(*v*) *Re Finch, Finch* v. *Finch* (1883), 23 Ch. D. 267, C. A., *per* JESSEL, M.R., at p. 271; see also *Hill* v. *Wilson* (1873), 8 Ch. App. 888; *Re Whittaker, Whittaker* v. *Whittaker* (1882), 21 Ch. D. 657; *Vavasseur* v. *Vavasseur* (1909), 25 T. L. R. 250; *Stamps (Minister)* v. *Townend*, [1909] A. C. 633, P. C.

(*w*) *Re Garnett, Gandy* v. *Macaulay* (1885), 31 Ch. D. 1, C. A.; *Re Hodgson, Beckett* v. *Ramsdale* (1885), 31 Ch. D. 177, C. A.; *Rawlinson* v. *Scholes* (1898), 79 L. T. 350; *Re Griffin, Griffin* v. *Griffin* (1898), 79 L. T. 442.

SECT. 3. The Judgment or Order.

English creditors in the same class (*x*); though in a case in which the foreign assets were distributed so as to give the foreign creditors, as such, priority, the court would, in distributing the English assets, be astute to equalise the payments, and take care that no foreign creditors should come in and receive anything till the English creditors had been paid a proportionate amount (*y*).

Interest on debts.

Where a judgment or order is made directing an account of the debts of a deceased person, unless otherwise ordered, interest is computed on such of the debts as carry interest at the rate they respectively carry, and as to all others at the rate of 4 per cent. from the date of the judgment or order (*a*).

Powers of court in general.

810. The powers of the court to make representation (*b*) and classification orders (*c*), to bind absent parties by serving them with notice of judgments (*d*), to order the sale of real estate (*e*), and the general practice in taking accounts in chambers are dealt with elsewhere (*f*).

SECT. 4.—*Consolidation and Transfer of Proceedings.*

Requirements and effect of consolidation.

811. Where several actions are pending for the administration of the same estate, application may be made before judgment in any of the actions to have them consolidated (*g*). After the order to consolidate the actions proceed as one action, and one judgment is pronounced in the consolidated action.

Conduct.

The conduct of the consolidated action is, as a rule, given to the party who has the greatest interest in keeping down the costs of the proceedings (*h*): thus, a residuary legatee will be preferred to a creditor (*i*) or to an executor (*k*).

Transfer after administration order.

812. Where an order for administration has been made, the judge in whose court the administration is pending has power, without any further consent, to order the transfer to himself of any cause or matter pending in any other court or division by or against the personal representative (*l*). The application for the transfer may be made *ex parte* (*m*). The rule does not apply

(*x*) *Re Klœbe, Kannreuther* v. *Geiselbrecht* (1884), 28 Ch. D. 175, reviewing *Cook* v. *Gregson* (1854), 2 Drew. 286; *Eames* v. *Hacon* (1881), 18 Ch. D. 347, C. A.; and *Blackwood* v. *R.* (1882), 8 App. Cas. 82, P. C.

(*y*) *Re Klœbe, Kannreuther* v. *Geiselbrecht, supra*, at p. 177.

(*a*) R. S. C., Ord. 55, r. 62. This rule applies only to solvent estates; see p. 345, *post*.

(*b*) See R. S. C., Ord. 16, rr. 9, 32 (a), (b).

(*c*) See *ibid.*, Ord. 55, r. 40.

(*d*) See *ibid.*, Ord. 16, r. 40.

(*e*) See *ibid.*, Ord. 51, r. 1.

(*f*) See titles JUDGMENTS AND ORDERS; PRACTICE AND PROCEDURE.

(*g*) See R. S. C., Ord. 49, r. 8.

(*h*) *Re Prime's Estate* (1883), 48 L. T. 208, 210.

(*i*) *Penny* v. *Francis* (1861), 7 Jur. (N. S.) 248.

(*k*) *Kelk* v. *Archer, Archer* v. *Kelk* (1852), 16 Jur. 605.

(*l*) R. S. C., Ord. 49, r. 5. For instances of transfer, see *Re Stubbs' Estate, Hanson* v. *Stubbs* (1878), 8 Ch. D. 154; *Re Timms* (1878), 26 W. R. 692; *West* v. *Downman*, [1879] W. N. 13.

(*m*) *Field* v. *Field*, [1877] W. N. 98; *Whitaker* v. *Robinson*, [1877] W. N.

to an action against the representative personally (*n*), nor will the court restrain a creditor who has, prior to the administration order, recovered judgment against the representative from pursuing his remedy on the judgment against the representative personally (*o*).

When judgment given in one of several concurrent actions.

Where judgment has been pronounced in one of several concurrent administration actions, the general practice is to direct the administration to be proceeded with in that action in which a judgment has first been obtained, and to stay proceedings in the others (*p*). The costs of the proceedings which are stayed are made costs in the other action (*q*). This practice will be departed from where the judgment has been unfairly obtained (*r*), or where the relief sought by and obtainable in the other actions is more comprehensive than that in the action in which the judgment has been made (*s*), though in the latter case the judgment may be allowed to proceed on the undertaking of the parties to submit to the additional accounts and inquiries (*t*). Where two actions are brought on behalf of infant plaintiffs, that one will be proceeded with which is more for their benefit (*a*).

Infant plaintiffs.

Conduct of proceedings after stay.

813. If the first action is stayed by reason of a judgment in the second action having been first obtained, the general rule is to give the conduct of the proceedings to the plaintiff in the first action (*b*). The court has a discretion (*c*), and will depart from the rule where the relief sought in the first action is imperfect (*d*), or the action

201; *Re United Kingdom Electric Telegraph Co.* (1881), 29 W. R. 332; *Re Sharpe, Scott* v. *Sharpe*, [1884] W. N. 28.

(*n*) *Chapman* v. *Mason* (1879), 40 L. T. 678.

(*o*) *Re Womersley, Etheridge* v. *Womersley* (1885), 29 Ch. D. 557; *Haly* v. *Barry* (1868), 3 Ch. App. 452, *per* PAGE WOOD, L.J., at p. 457.

(*p*) *Taylor* v. *Southgate* (1839), 4 My. & Cr. 203; *Wynne* v. *Hughes* (1859), 26 Beav. 377, 382; *Harvey* v. *Coxwell, Wilson* v. *Coxwell* (1875), 32 L. T. 52.

(*q*) *Gwyer* v. *Peterson, Peterson* v. *Peterson* (1858), 26 Beav. 83; *Taylor* v. *Southgate, supra; Kenyon* v. *Kenyon* (1866), 35 Beav. 300. They are payable in due course of administration (*Re Clark, Cumberland* v. *Clark* (1869), 4 Ch. App. 412).

(*r*) *Harris* v. *Gandy, Wills* v. *Gandy* (1859), 1 De G. F. & J. 13; *Rhodes* v. *Barret, Singleton* v. *Barret* (1871), 41 L. J. (CH.) 103.

(*s*) *Pickford* v. *Hunter* (1831), 5 Sim. 122; *Rigby* v. *Strangways* (1846), 2 Ph. 175; *Underwood* v. *Jee* (1849), 1 Mac. & G. 276; *Hoskins* v. *Campbell, Gibbon* v. *Campbell* (1864), 2 Hem. & M. 43; *Zambaco* v. *Cassavetti* (1871), L. R. 11 Eq. 439.

(*t*) *Gwyer* v. *Peterson, Peterson* v. *Peterson, supra; Matthews* v. *Palmer, Pritchard* v. *Palmer* (1863), 11 W. R. 610; and see *Vanrenen* v. *Piffard, Piffard* v. *Vanrenen* (1865), 13 W. R. 425.

(*a*) *Virtue* v. *Miller* (1871), 19 W. R. 406; see also *Harris* v. *Lightfoot, Harris* v. *Harris* (1861), 10 W. R. 31, as to preferential right of mother to act as next friend.

(*b*) *Frost* v. *Ward* (1864), 2 De G. J. & Sm. 70; *Belcher* v. *Belcher* (1865) 2 Drew. & Sm. 444; *Zambaco* v. *Cassavetti, supra; Rhodes* v. *Barret, Ex parte Singleton* (1871), L. R. 12 Eq. 479. The rule applies, though the first action was in the Palatine Court, and the second, in which the decree has been obtained, in the High Court (*Re Swire, Mellor* v. *Swire* (1882), 21 Ch. D. 647, C. A.; see also *Townsend* v. *Townsend* (1883), 23 Ch. D. 100, C. A.).

(*c*) See R. S. C., Ord. 16, r. 39; *Re Swire, Mellor* v. *Swire, supra.*

(*d*) *Re Smith's Estate, McMurray* v. *Mathew, Mathew* v. *Mathew* (1876), 33 L. T. 804.

SECT. 4. Consolidation and Transfer of Proceedings.

is defective (*e*), or where the claim of the plaintiff whose action was first instituted is *bonâ fide* disputed (*f*).

The court has power to deprive a plaintiff of the conduct on account of delay (*g*): the person so deprived will not get his costs of attending the taking of the accounts in chambers subsequent to his removal (*h*), but he will be allowed his costs of appearing on further consideration to ask for costs up to his removal (*i*).

SECT. 5.—*Administration of Insolvent Estates.*

Insolvent estates.

814. It is provided by the Judicature Act, 1875 (*k*), that in the administration of the assets of a person who has died since the 1st November, 1875, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, the same rules are to prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt (*l*); and all persons who in any such case would be entitled to prove for and receive dividends out of the estate may come in under the judgment or order for the administration of the estate, and make such claims against the same as they may be entitled to by virtue of the enactment.

Application of bankruptcy rules.

Where rules apply.

The enactment applies where there is sufficient reason to believe that the estate will turn out insolvent (*m*), and to an estate which, though sufficient for payment in full of the deceased's debts and liabilities apart from the costs of administration, becomes insufficient by reason of those costs (*n*). The court may direct an inquiry whether the estate is insolvent (*o*).

Order of payment of debts.

Not only are the rules as to what debts and liabilities are provable in bankruptcy incorporated into the administration of insolvent estates, but also the bankruptcy rules regulating the order in which the debts and liabilities are to be paid (*p*). Thus, voluntary debts

(*e*) *Re McRae, Forster* v. *Davis, Norden* v. *McRae* (1883), 25 Ch. D. 16, C. A.

(*f*) *Re Ross, Wingfield* v. *Blair*, [1907] 1 Ch. 482.

(*g*) *Sims* v. *Ridge* (1817), 3 Mer. 458, 464; *Bennett* v. *Baxter* (1840), 10 Sim. 417; *Cook* v. *Bolton* (1828), 5 Russ. 282.

(*h*) *Armstrong* v. *Armstrong* (1871), L. R. 12 Eq. 614.

(*i*) *Joseph* v. *Goode, Joseph* v. *Goode, Fisher* v. *Goode* (1875), 23 W. R. 225.

(*k*) 38 & 39 Vict. c. 77, s. 10.

(*l*) For rules in bankruptcy, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 197 *et seq.*

(*m*) *Re Hopkins, Williams* v. *Hopkins* (1881), 18 Ch. D. 370, C. A., *per* JESSEL, M.R., at p. 377.

(*n*) *Re Leng, Tarn* v. *Emmerson*, [1895] 1 Ch. 652, C. A.

(*o*) *Re Smith, Green* v. *Smith* (1883), 22 Ch. D. 586. It is not the proper practice to insert in the administration order a direction that the bankruptcy rules are to apply (*Re Murray, Woods* v. *Greenwell* (1882), 45 L. T. 707, not following *Re Hildick, Hipkins* v. *Hildick* (1881), 44 L. T. 547). As to administration by the Official Receiver in Bankruptcy, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 104.

(*p*) See *Re Whitaker, Whitaker* v. *Palmer*, [1901] 1 Ch. 9, C. A. For the rules as to provable debts and liabilities, see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 37; and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 197 *et seq.*

are to be paid *pari passu* with debts for valuable consideration (*q*), judgment creditors *pari passu* with other creditors (*r*), and claims of a wife for money lent to her husband are to be postponed to the claims of creditors for valuable consideration (*s*).

Preferential payments.

815. The proper funeral and testamentary expenses constitute a first charge upon the deceased's assets (*t*), and are payable in priority to all other claims, even in the case where the estate is being administered in bankruptcy (*a*). The priority as to rates and wages enforced (*b*) in the case of bankruptcy applies in the case of a deceased insolvent whose estate is being administered in the Chancery Division (*c*). Friendly societies (*d*) and trustees of savings banks (*e*) have a similar priority in respect of money due to them by their officers, and workmen in respect of compensation due to them from their employers (*f*).

Extent to which the Crown is bound.

816. Notwithstanding the section of the Bankruptcy Act, 1883, which provides that the provisions of the Act relating to the priorities of debts are to bind the Crown (*g*), the Crown, it has been held, is not, in the administration of insolvent estates, deprived of its prerogative right to prior payment (*h*); it is, however, extremely doubtful whether this decision can be supported (*i*).

Right of retainer.

817. The right of retainer by an executor is not affected by the incorporation of the bankruptcy rules into the administration of insolvent estates (*k*).

Interest on debts.

818. A creditor of an insolvent estate whose debt bears interest is not entitled to interest up to the date of payment, but only to the date of the judgment for administration, which is equivalent to an adjudication in bankruptcy (*l*).

(*q*) *Re Whitaker*, *Whitaker* v. *Palmer*, [1901] 1 Ch. 9, C. A., disapproving *Smith* v. *Morgan* (1880), 5 C. P. D. 337, and *Re Maggi*, *Winehouse* v. *Winehouse* (1882), 20 Ch. D. 545.

(*r*) *M'Causland v. O'Callaghan*, [1904] 1 I. R. 376, C. A.

(*s*) *Re Leng*, *Tarn* v. *Emmerson*, [1895] 1 Ch. 652, C. A.; see Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 3.

(*t*) 3 Co. Inst. 202; *Tugwell* v. *Heyman* (1812), 3 Camp. 298; *Sharp* v. *Lush* (1879), 10 Ch. D. 468, *per* JESSEL, M.R., at p. 472; and see p. 240, *ante*.

(*a*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 125 (7); Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 2 (1).

(*b*) Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 1.

(*c*) *Re Heywood*, *Parkington* v. *Heywood*, [1897] 2 Ch. 593.

(*d*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 35. As to friendly societies generally, see title FRIENDLY SOCIETIES.

(*e*) Trustee Savings Banks Act, 1863 (26 & 27 Vict. c. 87), s. 14; Savings Banks Act, 1891 (54 & 55 Vict. c. 21), s. 13; see title BANKERS AND BANKING, Vol. I., pp. 576 *et seq.*

(*f*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 5 (3).

(*g*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 150.

(*h*) *Re Churchill* (*Lord*), *Manisty* v. *Churchill* (1888), 39 Ch. D. 174; see also *Re Oriental Bank Corporation*, *Ex parte The Crown* (1884), 28 Ch. D. 643.

(*i*) For the views taken by the Court of Appeal as to the effect of the incorporation into administration of the rules in bankruptcy, see *Re Whitaker*, *Whitaker* v. *Palmer*, *supra*, *per* ROMER, L.J., at p. 14.

(*k*) *Lee* v. *Nuttall* (1879), 12 Ch. D. 61, C. A.; *Re May*. *Crawford* v. *May* (1890), 45 Ch. D. 499; *Re Ambler*, *Woodhead* v. *Ambler*, [1905] 1 Ch. 697, C. A.

(*l*) *Re Summers*, *Boswell* v. *Gurney* (1879), 13 Ch. D. 136; Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10.

SECT. 5. **Administration of Insolvent Estates.**

Where an estate insolvent at the date of the judgment subsequently realises sufficient to pay the principal of all the debts, the bankruptcy rule as to *pari passu* payment of interest at 4 per cent. upon all debts, whether by law carrying interest or not, prevails over the Chancery rule that interest on debts which do not by law carry interest is to be paid only after the interest is paid on the debts which do carry interest (*m*).

Time for proving debt.

819. A creditor may come in at any time so long as there are assets remaining undistributed (*n*), provided he has not been guilty of wilful default in not sending in his claim previously (*o*). He is, however, put upon the terms of paying the costs occasioned by his application, and is not allowed to disturb prior distributions or to delay the payment of dividends to the other creditors. A similar practice prevails in bankruptcy (*p*).

Claims of creditors who have disappeared after proving.

Where funds subsequently fall in, but some of the creditors whose proofs have been allowed have disappeared, the court does not divide the entire fund amongst the creditors who can be traced, but retains a sum to meet the claims of those who have disappeared (*q*).

Position of secured creditors.

820. A secured creditor cannot prove for the whole of his debt, and rely upon his security for any balance which, owing to the deficiency of assets, might remain unpaid (*r*). Under the existing bankruptcy rules the secured creditor who wishes to prove against the estate must do one of three things: he may realise his security and prove for the balance; or he may surrender his security and prove for his whole debt; or he may assess his security and receive dividends on the balance due to him after deducting the assessed value (*s*). He may, however, so long as there are assets remaining undistributed, amend his valuation and come in and prove at any time upon terms (*t*). The terms imposed will be that he must pay the costs of the application to obtain leave to prove, and that the order giving him leave is not to delay any proceedings in the action so far as concerns the other creditors (*a*).

(*m*) *Re Whitaker, Whitaker* v. *Palmer*, [1904] 1 Ch. 299, disapproving *Re Henley, Alcock* v. *Henley* (1896), 75 L. T. 307. For the bankruptcy rule, see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 40 (4) (5); for the Chancery rule, see R. S. C., Ord. 55, rr. 62, 63. For the practice regulating the deduction of income tax from interest, see *Re Green, Ball* v. *Ellis*, [1904] W. N. 78.

(*n*) *Lashley* v. *Hogg* (1805), 11 Ves. 602; *Angell* v. *Haddon* (1816), 1 Madd. 529; *David* v. *Frowd* (1833), 1 My. & K. 200, 209; *Brown* v. *Lake* (1847), 1 De G. & Sm. 144; *Brett* v. *Carmichael* (1866), 35 Beav. 340; *Re Metcalfe, Hicks* v. *May* (1879), 13 Ch. D. 236, C. A.; *Harrison* v. *Kirk*, [1904] A. C. 1.

(*o*) *Hull* v. *Falconer* (1865), 11 Jur. (N. S.) 151.

(*p*) *Re McMurdo, Penfield* v. *McMurdo*, [1902] 2 Ch. 684, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 699.

(*q*) *Re Macdonald, McAlpin* v. *Macdonald* (1889), 59 L. J. (CH.) 231; *Ashley* v. *Ashley* (1877), 46 L. J. (CH.) 322, C. A.

(*r*) For an instance of the old rule, which has been abolished by the incorporation of the bankruptcy rules into the administration of insolvent estates (*Re Hopkins, Williams* v. *Hopkins* (1881), 18 Ch. D. 370, C. A.), see *Mason* v. *Bogg* (1837), 2 My. & Cr. 443.

(*s*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., rr. 9, 10, 11; see, too, title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 224 *et seq.*

(*t*) *Re McMurdo, Penfield* v. *McMurdo, supra.*

(*a*) *Ibid.*, p. 713.

A secured creditor, who chooses to rest upon his security without adopting any one of the above courses, has no debt provable in respect of which any reserve is to be made on a declaration of a dividend (*b*).

A creditor of two estates for the same debt receives dividends on the whole of his debts from both estates until satisfied (*c*).

Nature of assets to be administered.

821. The question what assets are to be administered is not affected by the Judicature Act, 1875 (*d*), and none of the rules of bankruptcy which go to swell the assets are applicable to the administration in Chancery of the deceased's estate (*e*). Accordingly the various sections of the Bankruptcy Acts which restrict the rights of creditors under execution or attachment (*f*), which avoid voluntary settlements (*g*) or unregistered bills of sale (*h*), or which deal with reputed ownership (*i*), have no application to the administration of insolvent estates.

822. The administration in bankruptcy of the estate of a deceased insolvent is dealt with elsewhere (*k*).

SECT. 6.—*Costs.*

General rule.

823. The general rule is that the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, are in the discretion of the court or judge, subject to this proviso, that a personal representative or trustee who has not unreasonably instituted or carried on or resisted any proceedings is not to be deprived of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division (*l*).

Right to costs in absence of misconduct.

824. Under the general practice of the Chancery Division a personal representative, who has not been guilty of misconduct, is allowed his costs of the administration proceedings as a matter of course (*m*).

Mere delay or mistake no reason for deprivation.

825. Mere delay in rendering accounts is not of itself sufficient ground for visiting a representative with the payment of costs, or

(*b*) *Re Lee, Ex parte Good* (1880), 14 Ch. D. 82, C. A.
(*c*) *Bonser* v. *Cox* (1842), 6 Beav. 84.
(*d*) 38 & 39 Vict. c. 77, s. 10.
(*e*) *Re Leng, Tarn* v. *Emmerson*, [1895] 1 Ch. 652, 655, 660, C. A.
(*f*) *Pratt* v. *Inman* (1889), 43 Ch. D. 175, following *Re Withernsea Brickworks* (1880), 16 Ch. D. 337, C. A.; *Hasluck* v. *Clark*, [1899] 1 Q. B. 699, 704, 709, C. A.
(*g*) *Re Gould, Ex parte Official Receiver* (1887), 19 Q. B. D. 92, C. A.
(*h*) *Re Knott* (1877), 7 Ch. D. 549, n.; *Re D'Epineuil* (*Count*) (1), *Tadman* v. *D'Epineuil* (1882), 20 Ch. D. 217.
(*i*) *Gorringe* v. *Irwell India Rubber and Gutta Percha Works* (1886), 34 Ch. D. 128, C. A.
(*k*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 93 *et seq.*, 213, 214.
(*l*) R. S. C., Ord. 65, r. 1. As to solicitors' costs generally, see title SOLICITORS.
(*m*) The same practice applies to the costs of an originating summons taken out under R. S. C., Ord. 55, r. 3, for the determination of questions without administration of the estate (*Re Medland, Eland* v. *Medland* (1889), 41 Ch. D. 476, C. A.).

SECT. 6. Costs.

even for depriving him of his costs (*n*), nor is the fact that the representative has made a mistake, or has endeavoured to charge in his accounts items which he is not legally entitled to charge, provided his claims are not dishonest claims, nor such as no reasonable man could say ought to have been put forward (*o*).

When representative liable for costs.

Where, however, administration proceedings are rendered necessary by the gross and indefensible neglect of the representative to furnish accounts, he will be ordered to pay all the costs, including the costs of taking and vouching the accounts (*p*). So, too, a representative who unnecessarily institutes administration proceedings will be ordered to pay the costs (*q*).

When appeal lies.

826. A personal representative has a right, without leave, to appeal against an order depriving him of or directing him to pay costs (*r*); on the other hand, no appeal lies, without leave, against an order allowing him his costs (*s*). The distinction is based upon this ground, namely, that the court can only deprive a personal representative of his costs on the ground of misconduct, and whether he has been guilty of misconduct is a question of fact on which an appeal lies (*t*); on the other hand, an order allowing him his costs must have been made either on the ground that he has been guilty of no misconduct and is therefore entitled to them, or that, though guilty of misconduct, the court has in its discretion allowed him his costs, and no appeal without leave lies against an order as to costs only which are in the discretion of the court (*a*).

Costs of collateral action.

827. The representative's costs of another action are not costs within the discretion of the court before which the administration proceedings are pending; they are in the nature of charges and expenses, and an appeal lies without leave, even against an order made in the administration proceedings allowing them out of the estate (*b*). But an appeal from an order allowing

(*n*) *Heighington* v. *Grant* (1845), 1 Ph. 600; *White* v. *Jackson* (1852), 15 Beav. 191.

(*o*) *Re Jones, Christmas* v. *Jones*, [1897] 2 Ch. 190, *per* KEKEWICH, J., at pp. 197, 198; see also *Turner* v. *Hancock* (1882), 20 Ch. D. 303, C. A.; *Travers* v. *Townsend* (1828), 1 Mol. 496; *Bennett* v. *Attkins* (1835), 1 Y. & C. (EX.) 247; *Smith* v. *Cremer* (1875), 24 W. R. 51.

(*p*) *Heugh* v. *Scard* (1875), 33 L. T. 659; *Re Skinner, Cooper* v. *Skinner*, [1904] 1 Ch. 289, holding that *Hewett* v. *Foster* (1844), 7 Beav. 348, does not represent the modern practice. For other cases where the representative has been ordered to pay the costs, see *Eglin* v. *Sanderson* (1862), 3 Giff. 434; *Kemp* v. *Burn* (1863), 4 Giff. 348; *Gresham* v. *Price* (1865), 35 Beav. 47; *Re Bell's Estate, Bath* v. *Bell* (1878), 39 L. T. 422; *Re Radclyffe, Pearce* v. *Radclyffe* (1881), 29 W. R. 420; *Re Hayter, Re Wallett, Hayter* v. *Wells* (1883), 32 W. R. 26.

(*q*) *Re Cadburn, Gage* v. *Rutland* (1882), 46 L. T. 848.

(*r*) *Re Knight's (Sarah) Will* (1884), 26 Ch. D. 82, C. A.; *Re Love, Hill* v. *Spurgeon* (1885), 29 Ch. D. 348, C. A. A declaration that the court does not think fit to make any order as to costs amounts to a judicial decision that the trustee is not entitled to his costs, and that he cannot retain them out of the estate (*Re Hodgkinson, Hodgkinson* v. *Hodgkinson*, [1895] 2 Ch. 190, C. A.).

(*s*) *Charles* v. *Jones* (1886), 33 Ch. D. 80, C. A.

(*t*) *Re Knight's (Sarah) Will, supra, per* COTTON, L.J., at p. 90; *Re Pugh, Lewis* v. *Pritchard* (1888), 57 L. T. 858.

(*a*) *Charles* v. *Jones, supra;* Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 49.

(*b*) *Re Beddoe, Downes* v. *Cottam*, [1893] 1 Ch. 547, C. A., explaining, on this point, *Charles* v. *Jones, supra.*

the representative his costs, charges, and expenses will not lie, without leave, as to costs only, if the order is right as to charges and expenses (*c*).

Costs of representative in default.

828. No costs are given to a representative who is in default to the estate until the default is made good (*d*). An executor not in default need not appear by the same solicitor as a defaulting co-executor; he is entitled to act by a separate solicitor, and if he does so he will get his costs (*e*). If he chooses to appear by the same solicitor as his defaulting co-executor, he will be allowed only his proportion of the costs out of the estate (*f*). A defaulting executor, who becomes bankrupt, is entitled to his costs subsequent to the bankruptcy, but the prior costs must be set off against the debt (*g*). The representative of a defaulting executor, fairly accounting, is entitled to his costs out of the assets, though the assets may be insufficient to repair the breach of trust (*h*).

Representative's right to indemnity by creditor.

829. A plaintiff creditor must, so far as the estate is insufficient to meet them, pay the representative's costs of the action where it appears that there were no assets at the time of action brought sufficient to meet his claim, whether he has or has not had notice of the insufficiency of the assets (*i*).

Costs of parties other than the representative.

830. The costs of all parties other than the personal representative are now entirely within the discretion of the court (*k*); a plaintiff residuary legatee is no longer entitled to his costs out of the estate as a matter of right (*l*). As a general rule the court allows the costs of all necessary and proper parties to administration proceedings as a first charge upon the estate which is being administered (*m*); but it will only allow them where the proceedings are in their origin directed, with some show of reason and a proper foundation, for the benefit of the estate, or have in their result conduced to that benefit (*n*). Thus, a legatee tenant for life

(*c*) *Bew* v. *Bew*, [1899] 2 Ch. 467, C. A., overruling *Re Chennell*, *Jones* v. *Chennell* (1878), 8 Ch. D. 492, C. A.

(*d*) The solicitor of the representative is in no better position (*Re O'Kean, Deceased, Ferris* v. *O'Kean*, [1907] 1 I. R. 223, C. A.).

(*e*) *Smith* v. *Dale* (1881), 18 Ch. D. 516, *per* JESSEL, M.R., at p. 518.

(*f*) *Smith* v. *Dale*, *supra*, dissenting from *Watson* v. *Row* (1874), L. R. 18 Eq. 680; see, too, *McEwan* v. *Crombie* (1883), 25 Ch. D. 175.

(*g*) *Samuel* v. *Jones* (1843), 2 Hare, 246; *Re Vowles, O'Donoghue* v. *Vowles* (1886), 32 Ch. D. 243, following *Re Basham, Hannay* v. *Basham* (1883), 23 Ch. D. 195, and *Lewis* v. *Trask* (1882), 21 Ch. D. 862, and dissenting from *Clare* v. *Clare* (1882), 21 Ch. D. 865.

(*h*) *Haldenby* v. *Spofforth* (1846), 9 Beav. 195; *Palmer* v. *Jones* (1874), 43 L. J. (CH.) 349; *Re Kitto, Kitto* v. *Luke* (1879), 28 W. R. 411.

(*i*) *Hibernian Bank* v. *Lauder*, [1898] 1 I. R. 262; *Bluett* v. *Jessop* (1821), Jac. 240; *Sullivan* v. *Bevan* (1855), 20 Beav. 399; *King* v. *Bryant* (1841), 4 Beav. 460; *Fuller* v. *Green* (1857), 24 Beav. 217.

(*k*) R. S. C., Ord. 65, r. 1; *Re McClellan, McClellan* v. *McClellan* (1885), 29 Ch. D. 495, C. A.

(*l*) For old practice, see *Farrow* v. *Austin* (1881), 18 Ch. D. 58, C. A.

(*m*) *Loomes* v. *Stotherd* (1823), 1 Sim. & St. 458, 461; *Ford* v. *Chesterfield* (*Earl*) (1856), 21 Beav. 426; *Larkins* v. *Paxton* (1835), 2 My. & K. 320; *Barker* v. *Wardle* (1835), 2 My. & K. 818.

(*n*) *Bartlett* v. *Wood* (1861), 9 W. R. 817, *per* Lord WESTBURY, L.C., at p. 818; *Turner* v. *Frampton* (1846), 2 Coll. 331.

SECT. 6. Costs.

who has received the whole of his income to date must personally pay the costs of administration proceedings instituted by himself (*o*).

Improper litigation.

The court will not permit costs occasioned by improper litigation, or by negligent conduct of administration proceedings, to be paid out of the estate under its care (*p*). A beneficiary who sets up a case of misconduct against the representative which he fails to substantiate must, of course, pay the costs of the proceedings (*q*). The costs of a successful claimant in an issue directed to be tried in administration proceedings will be ordered to be paid in full out of the assets (*r*).

Costs of overpaid beneficiary.

831. A beneficiary who has been overpaid will not be paid his separate costs, although the deficiency has arisen from the wasting of the estate subsequently to the payment to him (*s*).

Costs of unsuccessful claims.

832. The costs occasioned by an unsuccessful claim, or unsuccessful resistance to any claim, to any property are not to be paid out of the estate unless the judge otherwise directs (*t*). The costs of a claimant, even though he fail to establish his claim, may, however, be allowed out of the estate, where he has enabled the court to construe the will, or to distribute the fund (*a*).

Funds for payment of costs.

833. The general personal estate is the primary fund for the payment of the costs of an action for administration or for carrying into effect the trusts of a will (*b*).

So far as the costs have been increased by the administration of the real estate, the increased costs must be borne by the realty (*c*), even though it vests in the personal representative by statute (*d*), and though the testator may have directed his testamentary expenses to be borne by his personal estate (*e*).

Mixed fund.

Where a testator has created a mixed fund of real and personal estate, the costs of administering the fund are borne rateably by the two portions of the estate (*f*).

(*o*) *Croggan* v. *Allen* (1882), 22 Ch. D. 101.

(*p*) *Brown* v. *Burdett* (1888), 40 Ch. D. 244, C. A.; *Re Scowby, Scowby* v. *Scowby*, [1897] 1 Ch. 741, C. A.; see also *Curteis* v. *Candler* (1821), Madd. & G. 123.

(*q*) *Williams* v. *Jones* (1886), 34 Ch. D. 120, C. A.

(*r*) *Re Dunn, Brinklow* v. *Singleton*, [1902] W. N. 76.

(*s*) *Re Winslow, Frere* v. *Winslow* (1890), 45 Ch. D. 249.

(*t*) R. S. C., Ord. 65, r. 14A.

(*a*) *Thomason* v. *Moses* (1842), 5 Beav. 77; *Wedgwood* v. *Adams* (1844), 8 Beav. 103; *Merlin* v. *Blagrave* (1858), 25 Beav. 125; for other instances, see *Westcott* v. *Culliford* (1844), 3 Hare, 265, 274; *Cooper* v. *Pitcher* (1845), 4 Hare, 485; *Johnston* v. *Todd* (1845), 8 Beav. 489; *Boreham* v. *Bignall* (1850), 8 Hare, 131; *Lee* v. *Delane* (1850), 4 De G. & Sm. 1.

(*b*) *Barnwell* v. *Iremonger* (1860), 1 Drew. & Sm. 242, 255, 258; *Re Jones, Jones* v. *Caless* (1878), 10 Ch. D. 40, 41.

(*c*) *Patching* v. *Barnett* (1881), 51 L. J. (CH.) 74, C. A.; *Re Middleton, Thompson* v. *Harris* (1882), 19 Ch. D. 552, C. A.

(*d*) *Re Jones, Elgood* v. *Kinderley, Elgood* v. *Jones*, [1902] 1 Ch. 92.

(*e*) *Re Betts, Doughty* v. *Walker*, [1907] 2 Ch. 149. As to what is included under the expression "testamentary expenses," see titles ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 219; WILLS.

(*f*) *Johnston* v. *Todd* (1845), 8 Beav. 489; *Hopkinson* v. *Ellis* (1846), 10 Beav. 169; *Cradock* v. *Owen* (1854), 2 Sm. & G. 241.

Costs of administration where share fails.

834. Where the gift of a share of residuary personalty or of a mixed fund of real and personal estate fails by reason of the death of a residuary legatee, the costs of administration are not thrown primarily upon the lapsed share (*g*). The same rule applies where a portion of a residuary gift fails by some provision of law, as, for instance, by the operation of the Statutes of Mortmain (*h*), or of the Thellusson Act (*i*). It would also appear that real estate ineffectually disposed of does not bear the cost of administration in priority to realty effectually disposed of (*k*).

Proceedings by unpaid residuary legatees.

835. Where a portion of the estate has been distributed amongst certain residuary legatees, and the unpaid residuary legatees institute administration proceedings, the legatees who have received their shares cannot be ordered to contribute to the costs of the action, but they will not get their costs without first bringing in their shares and contributing to the costs (*l*).

Costs of inquiries.

836. The costs of inquiries to ascertain the persons entitled to a legacy, money, or share, or otherwise incurred in relation thereto, are payable out of the legacy, money, or share unless the judge otherwise directs (*m*). The costs will be directed to be paid out of the residuary estate where the difficulty arises owing to the language the testator has employed (*n*), or where the testator has directed his testamentary expenses to be paid out of residue (*o*); but the court ought not to be so ready, as was at one time the practice, to direct that the costs of inquiries relating to particular shares ought to come out of residue (*p*).

The costs of establishing a claim as next of kin of an intestate are allowed out of the general estate (*q*).

(*g*) *Ackroyd* v. *Smithson* (1780), 1 Bro. C. C. 503; see *Roberts* v. *Walker* (1830), 1 Russ. & M. 752, 767; *Eyre* v. *Marsden* (1839), 4 My. & Cr. 231, 245; *Trethewy* v. *Helyar* (1876), 4 Ch. D. 53; *Fenton* v. *Wills* (1877), 7 Ch. D. 33; *Luckraft* v. *Pridham* (1879), 48 L. J. (CH.) 636, disapproving *Row* v. *Row* (1869), L. R. 7 Eq. 414.

(*h*) *A.-G.* v. *Winchelsea* (*Earl*) (1791), 3 Bro. C. C. 373; *A.-G.* v. *Hurst* (1790), 2 Cox, Eq. Cas. 364; *Curtis* v. *Hutton* (1808), 14 Ves. 537; *Blann* v. *Bell* (1877), 7 Ch. D. 382, disapproving *Gowan* v. *Broughton* (1874), L. R. 19 Eq. 77.

(*i*) *Eyre* v. *Marsden* (1839), 4 My. & Cr. 231, 245; *Elborne* v. *Goode* (1844), 14 Sim. 165.

(*k*) *Maddison* v. *Pye* (1863), 32 Beav. 658; *Bagot* v. *Legge* (1864), 2 Drew. & Sm. 259; *Hardwick* v. *Hardwick* (1873), 42 L. J. (CH.) 636; *Hurst* v. *Hurst* (1884), 28 Ch. D. 159; but see *Scott* v. *Cumberland* (1874), L. R. 18 Eq. 578, for a conflicting decision.

(*l*) *Mackenzie* v. *Taylor* (1844), 7 Beav. 467; *Re Tann, Tann* v. *Tann, Gravatt* v. *Tann* (2) (1869), L. R. 7 Eq. 436; *Hilliard* v. *Fulford* (1876), 4 Ch. D. 389.

(*m*) R. S. C., Ord. 65, r. 14B. See also *Re Whitaker, Denison-Pender* v. *Evans* (1910), 130 L. T. Jo. 55.

(*n*) *Re Groom, Booty* v. *Groom*, [1897] 2 Ch. 407.

(*o*) *Re Baumgarten, Bevan* v. *Rosenbaum* (1900), 82 L. T. 711; *Re Lacy, Dyson* v. *Speight* (1908), 124 L. T. Jo. 293; *Re Vincent, Rohde* v. *Palin*, [1909] 1 Ch. 810. The executor cannot, by paying a legacy into court, relieve the residue from bearing the costs of an inquiry as to the persons entitled to the legacy (*Re Gibbons' Will* (1887), 36 Ch. D. 486; *Re Trick's Trusts, Ex parte Willoby* (1869), 5 Ch. App. 170; *Re Birkett* (1878), 9 Ch. D. 576).

(*p*) *Graham* v. *Clinton* (*Lord*) (1899), 81 L. T. 717, *per* STIRLING, J. at p. 719. For the former practice of the court, see *Re Gibbons' Will, supra; Re Reeve's Trusts* (1877), 4 Ch. D. 841; *Wilson* v. *Squire* (1842), 13 Sim. 212; *Re Haseldine, Grange* v. *Sturdy* (1886), 31 Ch. D. 511, C. A.

(*q*) *Bennett* v. *Wood* (1837), 7 Sim. 522; *Bakewell* v. *Tagart* (1838) 3 Y. & C. (EX.) 173.

SECT. 6. **Costs.**

Where some beneficiaries are ascertained.

837. Where some of the persons entitled to a distributive share of a fund are ascertained, and difficulty or delay has occurred or is likely to occur in ascertaining the persons entitled to the other shares, immediate payment may be allowed to the persons who have been ascertained without reserving any part of their shares to answer the subsequent costs of ascertaining the persons entitled to the other shares (*r*).

Costs as between solicitor and client.

838. The costs of the representative, where no misconduct on his part is made out, are allowed as between solicitor and client and in priority to the costs of all other parties (*s*). His right is not affected by the fact that the order on further consideration directs the costs of all parties to be paid out of the funds in court, and the funds prove to be insufficient to meet all the costs (*t*).

When creditor entitled to solicitor and client costs.

839. Where the estate is insufficient for payment of debts a creditor is entitled to his costs as between solicitor and client both where he is the original plaintiff (*a*), and where he has obtained the conduct of the action (*b*); on the other hand, if the estate is not deficient he obtains his costs only on the party and party scale (*c*).

The plaintiff in a legatee's action where the estate is insufficient to pay legacies (*d*) is entitled to his costs as between solicitor and client, but only if the fund is sufficient to pay creditors (*e*).

Costs of proceedings on originating summons.

840. In the case of proceedings instituted by originating summons for the determination of questions arising in the administration of the estate, the costs of all parties are allowed out of the estate where the application is made by the personal representative, or by a beneficiary where there is some difficulty which would have

(*r*) R. S. C., Ord. 65, r. 14c.

(*s*) *Tanner* v. *Dancey* (1846), 9 Beav. 339; *Sanderson* v. *Stoddart* (1863), 32 Beav. 155; *Dodds* v. *Tuke* (1884), 25 Ch. D. 617; *Re Love, Hill* v. *Spurgeon* (1885), 29 Ch. D. 348, C. A.; *Re Barne, Lee* v. *Barne* (1890), 62 L. T. 922. They are allowed now in priority to a mortgagee plaintiff's costs of sale (*Re Spensley's Estate, Harrison* v. *Spensley* (1872), 42 L. J. (CH.) 21). As to taxation of costs generally, see title SOLICITORS.

(*t*) *Re Griffith, Jones* v. *Owen*, [1904] 1 Ch. 807, following *Gaunt* v. *Taylor* (1843), 2 Hare, 413, and not following *Swale* v. *Milner* (1834), 6 Sim. 572.

(*a*) *Tootal* v. *Spicer* (1831), 4 Sim. 510; *Hood* v. *Wilson* (1831), 2 Russ. & M. 687; *Re Flynn, Guy* v. *M'Carthy* (1886), 17 L. R. Ir. 457; *Henderson* v. *Dodds* (1886), L. R. 2 Eq. 532

(*b*) *Re Richardson, Richardson* v. *Richardson* (1880), 14 Ch. D. 611.

(*c*) See the law on this subject reviewed by STIRLING, L.J., in *Re New Zealand Midland Rail. Co., Smith* v. *Lubbock*, [1901] 2 Ch. 357, C. A., explaining *Stanton* v. *Hatfield* (1836), 1 Keen, 358, and *Goldsmith* v. *Russell* (1855), 5 De G. M. & G. 547. In a case where the general estate was sufficient to pay separate creditors, but insufficient to pay joint creditors of a testator who was one of a firm of traders, the separate creditor plaintiff obtained solicitor and client costs (*Re McRea, Norden* v. *McRea* (1886), 32 Ch. D. 613).

(*d*) *Cross* v. *Kennington* (1848), 11 Beav. 89; *Thomas* v. *Jones* (1860), 1 Drew. & Sm. 134; *Re Harvey, Wright* v. *Woods* (1884), 26 Ch. D. 179.

(*e*) *Weston* v. *Clowes* (1847), 15 Sim. 610, disapproving *Burkitt* v. *Ransom* (1846), 2 Coll. 536; *Wetenhall* v. *Dennis* (1863), 33 Beav. 285; see also *Re Richardson, Richardson* v. *Richardson* (1880), 14 Ch. D. 611, *per* JESSEL, M.R., at p. 613, explaining that *Re Burrell, Burrell* v. *Smith* (1870), L. R. 9 Eq. 443, was not intended to alter the general rule; and *Re Wilkins, Wilkins* v. *Rotherham* (1884), 27 Ch. D. 703.

SECT. 6. Costs.

justified an application by the personal representative. But if a beneficiary takes advantage of the procedure by originating summons to get a question determined which, but for the procedure, would be the subject of an action commenced by writ, the court may apply the rule that the unsuccessful party pays the costs of the successful party (*f*).

(*f*) *Re Buckton, Buckton* v. *Buckton*, [1907] 2 Ch. 406, *per* KEKEWICH, J., at p. 415.

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See REAL PROPERTY AND CHATTELS REAL; TRUSTS AND TRUSTEES; WILLS.

EXPECTANT HEIRS.

See EQUITY; FRAUDULENT AND VOIDABLE CONVEYANCES; INFANTS AND CHILDREN; MONEY AND MONEY-LENDING.

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Part I.—In General.

SECT. 1.—*Legislation.*

Explosives Act, 1875.

841. The principal legislation regulating the manufacture, keeping, sale, importation, and conveyance of explosives is contained in the Explosives Act, 1875 (*a*), referred to in the present title as "the Act," and in Orders having statutory force made under that Act (*b*). In addition to the regulations contained in the Act, His Majesty may, by Order in Council, impose restrictions on, or prohibit absolutely, the manufacture, keeping, importation or sale of any explosive which is of so dangerous a character that, in the

(*a*) 38 & 39 Vict. c. 17. The powers given by the Act are in addition to and not in derogation of other powers conferred on local authorities by statute, see titles HIGHWAYS, STREETS AND BRIDGES; STREET TRAFFIC; but the Act contains provisions (not as yet acted upon) authorising the repeal, alteration, or amendment, by provisional order made by the Secretary of State and confirmed by Parliament, of any Act, charter, or custom respecting the manufacture, keeping, conveyance, importation, exportation, or sale of an explosive, or the powers of certain local authorities for regulating the same, or otherwise in relation to an explosive (*ibid.*, s. 103). Part I. of the Act relates to gunpowder, but the provisions of that part are applied by *ibid.*, s. 39, subject to certain provisions, to every other description of explosive as if those provisions were re-enacted with the substitution of that description of explosive for gunpowder. Most of the substantive provisions of Part I. as to gunpowder are, however, under powers given by *ibid.*, s. 40, replaced in reference to other explosives by provisions of more or less similar character contained in Orders in Council. The general administration of the Act is in the hands of H.M. Inspectors of Explosives, who form a department of the Home Office.

(*b*) The Explosives Act, 1875 (38 & 39 Vict. c. 17), contains numerous provisions under which various matters are to be regulated by Order in Council or Order of the Secretary of State; and it is expressly provided that His Majesty may from time to time make Orders in Council "for doing anything which is in this Act expressed to be authorised, directed, regulated, prescribed or done by Order in Council" (*ibid.*, s. 83). These Orders have statutory effect. The Orders in Council and Orders of the Secretary of State cited in this article are to be found in Statutory Rules and Orders for the year of each Order, or those before 1904 in Statutory Rules and Orders Revised (up to 31st December, 1903), Vol. IV., under the title "Explosives."

judgment of His Majesty, it is expedient for the public safety to make such Order, provided that the Order does not absolutely prohibit anything which may be lawfully done in pursuance of a continuing certificate (*c*).

Other statutory provisions.

There are provisions relating to explosives in several other statutes. Thus, the use of explosives for purposes of crime is dealt with in the Explosive Substances Act, 1883 (*d*), and the Malicious Damage Act, 1861 (*e*), while the use of explosives for blasting purposes in mines and quarries is regulated under the Acts dealing therewith (*f*).

SECT. 2.—*Definitions.*

Meaning of "explosive."

842. "Explosive" is defined (*g*) as meaning gunpowder, nitro-glycerine (*h*), dynamite, gun-cotton (*i*), blasting powders, fulminate of mercury or of other metals, coloured fires, and any other substance, whether similar to those named or not, used or manufactured with a view to produce a practical effect by explosion or a pyrotechnic effect; and as including fog-signals, fireworks (*k*), fuses, rockets, percussion caps, detonators, cartridges, ammunition of all descriptions, and every adaptation or preparation of an explosive as defined.

Extension of term to new substances.

843. His Majesty may, however, by Order in Council, declare any substance, which appears specially dangerous to life or property either by reason of its explosive properties or of any process in its manufacture being liable to explosion, to be an explosive within the meaning of the Act; and the provisions of the Act (*l*) and of any statutory Order thereunder (*m*) will thereupon

(*c*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 43; and as to a continuing certificate, see p. 370, *post*. If an explosive is imported or sold in contravention of any such Order all or any part of it may be forfeited. The owner or master of the ship in which it was imported is liable to a penalty not exceeding 10*s*. for every pound of explosive brought in the ship. The person to whom it was delivered and the person selling it are liable in similar penalties in respect of every pound sold or delivered or found in his possession (*ibid.*).

(*d*) 46 & 47 Vict. c. 3; and see p. 400, *post*.

(*e*) 24 & 25 Vict. c. 97; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 776, 777; and p. 393, *post*, for other offences.

(*f*) See title MINES, MINERALS AND QUARRIES.

(*g*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 3.

(*h*) A preparation of nitro-glycerine in extremely minute quantities is used in medicine; but the Home Office do not regard the drug as an explosive.

(*i*) The term "gun-cotton" is held by the Home Office to include certain of the lower forms of nitro-cotton usually known as collodion cotton, between which and gun-cotton no line is drawn by the Act, nor can be drawn scientifically. Celluloid, which consists of collodion cotton in a colloid state, mixed with various substances, is not considered by the Home Office to be an explosive.

(*k*) In deciding what is a "firework" the Home Office take into consideration whether or not the intention is to produce a "pyrotechnic effect," as opposed to fulfilling a mere illuminating or other useful object. Thus drain testers and magnesium wire have not been, while sparkler matches, throw-downs, and maroons, have been, treated as fireworks.

(*l*) For the statutory definition of "this Act," see p. 360, *post;* and see following note.

(*m*) For the purpose of brevity the expression "statutory Order" is used in

SECT. 2. Definitions.

(subject to any exceptions, limitations, and restrictions specified in the Order) extend to that substance as if it were included in the term "explosive" in the Act (*n*).

New explosives.

Under this power certain substances have, subject in each case to exceptions and limitations, been declared explosives (*o*).

"Authorised explosive."

844. An "authorised explosive" is defined for the purposes of certain Orders in Council under the Act as meaning any explosive for the time being authorised to be manufactured for general sale or to be imported for general sale, whether with or without a licence (*p*); and the same expression is defined in an Order of the Secretary of State under the Act as meaning exclusively an explosive defined in a list of authorised explosives signed by a Government inspector and in force for the time being (*q*). Having regard, however, to the practice of the Home Office, the two definitions have practically the same meaning (*r*).

Meaning of "manufacture."

845. Any person who carries on any of the following processes, namely, the process of dividing into its component parts or otherwise breaking up or unmaking any explosive, or of making fit for use any damaged explosive, or the process of remaking, altering, or repairing any explosive, is subject to the Act, and to any statutory Order thereunder, as if he manufactured an explosive, and the expression "manufacture" is to be construed accordingly (*s*).

"Safety cartridges."

"Safety cartridges" means cartridges for small arms of which the case can be extracted from the small arm after firing, and which are so closed as to prevent any explosion in one cartridge being communicated to other similar cartridges (*a*).

this title to include, where the context so admits, all licences, certificates, bye-laws, regulations, rules and orders granted or made in pursuance of the Act.

(*n*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 104.

(*o*) These are (1) acetylene when liquid or subject to a pressure above that of the atmosphere capable of supporting a column of water exceeding 100 inches in height, and whether or not in admixture with other substances, except such as may be exempted by Order of the Secretary of State (Order in Council, No. 17 of 26th November, 1897; Orders of Secretary of State, Nos. 5, 5A, and 6 of 28th September, 1898, of 29th September, 1905, and of 10th April, 1901, respectively); (2) acetylene in admixture with air or oxygen (Order in Council, No. 18 of 15th May, 1900); (3) picric acid, picrates, and mixtures of picric acid with other substances, except in certain circumstances (Orders in Council, Nos. 20 and 20A of 27th March, 1905, and 16th February, 1906, respectively).

(*p*) Order in Council, No. 6A of 20th April, 1883, s. 3 (b); Order in Council, No. 12 of 20th April, 1883, s. 5 (a); Order in Council, No. 16 of 26th October, 1896, Part I., s. 1.

(*q*) Order of Secretary of State, No. 7 of 10th June, 1904, r. 1.

(*r*) Before 1897 it was the practice to schedule to factory and importation licences detailed definitions of the explosives to which the licences extended, containing restrictions and definitions of standards of purity. In 1897, however, the practice was altered. Since that date a list of authorised explosives signed by a Government inspector has been kept at the Home Office containing like definitions, and the explosives to which licences extend are defined by reference to this list.

(*s*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 105. Such processes as making up ammunition, blasting cartridges, and miners' squibs and straws, can consequently be carried on only in premises where the manufacture of explosives is authorised.

(*a*) Cartridges of certain kinds are capable of exploding one another through

846. Where the quantity of gunpowder or ingredients of gunpowder allowed in a building at one time is limited by or under the Act, all gunpowder and ingredients within the radius of twenty yards of the building and in course of removal from the building or of removal to the building for the supply and work thereof are to be deemed to be in the building. But if, while the gunpowder or ingredients so in course of removal are within the radius, every machine and manufacturing process in the building is wholly stopped, there may, in addition to the limited quantity, be within the radius a further quantity, not exceeding that specified in the licence, or, in the case of an existing building in a "lawfully existing" factory (*b*), 10 cwt., or any less quantity allowed as above mentioned to be in the building (*c*).

Meaning of "in the building."

Limits to capacity of building.

Where the quantity allowed to be in a machine is limited by or under the Act, but the quantity allowed in the building containing the machine is not limited, the foregoing provisions apply, so far as circumstances admit, as if the machine were a building (*d*).

Should the quantity allowed in a building be limited to what is required for the immediate supply and work of the building, or by words not specifying the exact quantity, a Government inspector may, after hearing the occupier, require him to diminish the quantity to the maximum named in the requisition; but, if the occupier feels aggrieved by the requisition, he may require the matter to be referred to arbitration (*e*).

The foregoing provisions apply, *mutatis mutandis*, to explosives other than gunpowder as well as to gunpowder (*f*).

The following definitions are also contained in the Act (*g*):—

"Magazine" includes any ship or other vessel used for the purpose of keeping any explosive.

"Magazine."

"Factory magazine" means a building for keeping the finished explosive made in the factory, and includes, if the explosive is not gunpowder, any building for keeping the partly manufactured explosive or ingredients of the explosive which is mentioned in the licence.

"Factory magazine."

"Ship" includes every description of vessel used in sea navigation, whether propelled by oars or otherwise.

"Ship."

"Boat" means every vessel not a ship as above defined used in

"Boat."

concussion on the pin or cap. This does not prevent the cartridges from being safety cartridges. Such cartridges, however, require special packing to obviate the danger of their exploding each other (see Order of Secretary of State, No. 7 of 10th June, 1904).

(*b*) As to "lawfully existing" factories, see p. 370, *post*.

(*c*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 24; and see the statutory definition of "this Act," p. 360, *post*.

(*d*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 24.

(*e*) *Ibid.* As to arbitration under the Act, see p. 397, *post*.

(*f*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 39 (see note (*a*), p. 356, *ante*). In the case of explosives other than gunpowder the expression "ingredients" is held by the Home Office to mean explosive ingredients.

(*g*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 108, which should be referred to for definitions of the following expressions:—"Person," "occupier," "master," "warehouseman," "carrier," "canal company," "tidal water," "inland water," "railway company," "wharf," "carriage," "prescribed," "borough," "county," "urban sanitary authority," "Gunpowder Act, 1860."

SECT. 2. Definitions.

navigation in any inland water or harbour, whether propelled by oars or otherwise.

Local authorities.

847. The local authorities for the purposes of the Act in England and Wales are:—

In the city of London, the Corporation acting by the Common Council (*h*).

In the county of London, the London County Council (*i*).

In a county borough, or a borough which had separate quarter sessions before the Local Government Act, 1888 (*k*), or had a population, according to the census of 1881, of 10,000 or upwards, or a borough of which the council have been made the local authority by Order of the Secretary of State (*l*), the corporation acting by the council (*m*).

In any harbour, the harbour authority to the exclusion of any other local authority (*n*).

Elsewhere, the county council (*o*).

"Chief officer of police."

848. For the purposes of the Act, the "chief officer of police" means: (1) in the city of London, the Commissioner of City Police; (2) in the metropolitan police district, the Commissioner or any assistant commissioner or any district superintendent of metropolitan police; (3) elsewhere, the chief constable, or other officer having the chief command of the police district in reference to which the expression occurs.

"Police district."

"Police district" means (1) the city of London and the liberties thereof; (2) the metropolitan police district; and (3) any county, or liberty of a county, borough, town, place, or union, or combination of places maintaining a separate police force. For the purposes of the foregoing definitions, all the police under one chief constable are to be deemed to constitute one force (*p*).

"This Act."

849. In the Act the expression "this Act" includes any licence, certificate, bye-law, regulation, rule, or order granted or made in pursuance of the Act (*q*).

(*h*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 67.

(*i*) *Ibid.*; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 40 (8).

(*k*) 51 & 52 Vict. c. 41.

(*l*) Power was given to the Secretary of State by the Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 68, to declare the council of a borough rated to the county rate or the commissioners of any Improvement Act district to be the local authority for the purposes of the Act. The power was exercised in the case of thirty-one boroughs before the Local Government Act, 1888 (51 & 52 Vict. c. 41), but has not been exercised since that Act. As to the meaning of "local rate," see Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 70.

(*m*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 67; Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 3, 7, 34 (1), 35, 37, 38, 39.

(*n*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 67; and see the definition of "harbour authority," *ibid.*, s. 108. As to harbour authorities, generally, see title WATERS AND WATERCOURSES.

(*o*) *Ibid.*, s. 67; Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 3 (x.), 7 (b), 28 (2), 36, 37, 38, 39 (3). As to powers of delegation conferred on county councils, see title LOCAL GOVERNMENT.

(*p*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 107. As to police, generally, see title POLICE.

(*q*) *Ibid.*, s. 108. As to the expression "statutory Order" used in this title, see note (*m*), p. 357, *ante*.

SECT. 3. Classification.

SECT. 3.—*Classification.*

SECT. 3. Classification.

Classes.

850. For the purposes of the Act explosives are divided by Order in Council (*r*) into the following classes. When an explosive falls within the description of more than one class it is to be deemed to belong exclusively to the latest of the classes within the description of which it falls :—

Class 1 (Gunpowder). The term "gunpowder" means exclusively gunpowder ordinarily so called (*s*).

Class 2 (Nitrate-mixture). The term "nitrate-mixture" means any preparation other than gunpowder ordinarily so called formed by the mechanical mixture of a nitrate with any form of carbon or with any carbonaceous substance not possessed of explosive properties, whether sulphur be or be not added to such preparation, and whether such preparation be or be not mechanically mixed with any other non-explosive substance (*t*).

Class 3 (Nitro-compound). The term "nitro-compound" means any chemical compound possessed of explosive properties, or capable of combining with metals to form an explosive compound, which is produced by the chemical action of nitric acid (whether mixed or not with sulphuric acid) or of a nitrate mixed with sulphuric acid upon any carbonaceous substance, whether such compound is mechanically mixed with other substances or not. The class has two divisions (*a*).

Class 4 (Chlorate-mixture). The term "chlorate-mixture" means any explosive containing a chlorate. The class has two divisions (*b*).

Class 5 (Fulminate). The term "fulminate" means any chemical compound or mechanical mixture, whether included in the foregoing classes or not, which, from its great susceptibility to detonation, is suitable for employment in percussion caps or any other appliances for developing detonation, or which, from its extreme sensibility to explosion and from its great instability (*i.e.*, readiness to undergo

(*r*) Orders No. 1 and No. 1A of 5th August, 1875, and 12th December, 1891, respectively, the latter of which in effect merely amends the former in certain details with regard to the 7th (or firework) class.

(*s*) The definition has been considered by the Home Office to mean a mixture of saltpetre, charcoal (including charred woody substances, such, *e.g.*, as straw or lignite), and sulphur with no other ingredient.

(*t*) The class comprises such explosives as ammonal, bobbinite, westfalite ; and any preparation coming within the above definition.

(*a*) Division 1 comprises such explosives as nitro-glycerine, dynamite, cordite, gelignite, excellite, kolax, pitite, saxonite ; and any chemical compound or mechanically mixed preparation which consists either wholly or partly of nitro-glycerine or of some other liquid nitro-compound. Division 2 comprises such explosives as gun-cotton, ordinarily so-called, amberite, E.C. powder, roburite, ruby powder, Schultz's gunpowder, smokeless diamond, nitrated gun-cotton, picrates, picric powder ; and any nitro-compound as before defined which is not comprised in Division 1.

(*b*) Division 1 comprises such explosives as polarite, Brain's blasting powder, and any chlorate preparation which consists partly of nitro-glycerine or of some other liquid nitro-compound. Division 2 comprises such explosives as cheddite, mitchellite, blastine, Reveley's powder, Hochstadter's blasting charges, Reichen's blasting charges, teutonite, chlorated gun-cotton, and any chlorate mixture as before defined which is not comprised in Division 1.

SECT. 3. Classification.

decomposition from very slight exciting causes), is especially dangerous. The class has two divisions (*c*).

Class 6 (Ammunition). The term "ammunition" means an explosive of any of the foregoing classes when enclosed in any case or contrivance, or otherwise adapted or prepared so as to form a cartridge or charge for small arms, cannon, or any other weapon, or for blasting, or to form any safety or other fuse (*d*) for blasting or for shells, or to form any tube for firing explosives, or to form a percussion cap (*e*), a detonator (*f*), a fog signal, a shell, a torpedo, a war rocket, or other contrivance other than a firework. The class has three divisions (*g*).

Class 7 (Firework). The term "firework" comprises firework composition and manufactured fireworks. The class has two divisions (*h*).

(*c*) Division 1 comprises such substances as the fulminates of silver and of mercury, and preparations of these substances, such as are used in percussion caps; and any preparation consisting of a mixture of chlorate with phosphorus, or certain descriptions of phosphorus compounds, with or without the addition of carbonaceous matter, and any preparation consisting of a mixture of a chlorate with sulphur, or with a sulphuret, with or without carbonaceous matter. Division 2 comprises such substances as the chloride and the iodide of nitrogen, fulminating gold and silver, diazobenzol, and the nitrate of diazobenzol.

(*d*) The term "safety fuse" means a fuse for blasting which burns and does not explode, which does not contain its own means of ignition, and which is of such strength and construction and contains an explosive in such quantity that the burning of the fuse will not communicate laterally with any other similar fuse.

(*e*) The term "percussion cap" does not include a detonator.

(*f*) The term "detonator" means a capsule or case which is of such strength and construction and contains an explosive of the fulminate-explosive class in such quantity that the explosion of one capsule or case will communicate the explosion to other like capsules or cases.

(*g*) Division 1 comprises exclusively safety cartridges, safety fuses for blasting, railway fog signals, and percussion caps. The explosives comprised in this division are not liable to explosion in bulk.

Division 2 comprises any ammunition which does not contain its own means of ignition, and is not included in Division 1, such as cartridges for small arms which are not safety cartridges, cartridges and charges for cannon, shells, mines, blasting, or other like purposes, shells and torpedoes containing any explosives, fuses for blasting which are not safety fuses, fuses for shells, tubes for firing explosives, or war rockets, which do not contain their own means of ignition.

Division 3 comprises any ammunition which contains its own means of ignition, and is not included in Division 1, such as detonators, cartridges for small arms which are not safety cartridges, fuses for blasting which are not safety fuses, fuses for shells, tubes for firing explosives, which do contain their own means of ignition.

By ammunition containing its own means of ignition is meant ammunition having an arrangement, whether attached to it or forming part of it, which is adapted to explode or fire the same by friction or percussion.

(*h*) Division 1. The term "firework composition" means any chemical compound or mechanically mixed preparation of an explosive or inflammable nature which is used for the purpose of making manufactured fireworks, and is not included in the former classes of explosives, and also any star and any coloured fire composition, subject to the proviso mentioned below.

Division 2. The term "manufactured firework" means any explosive of the foregoing classes, and any firework composition when such explosive or composition is enclosed in any case or contrivance, or is otherwise manufactured so as to form a squib, cracker, serpent, rocket (other than a war rocket), maroon, lance, wheel, Chinese fire, Roman candle, or other article specially adapted

SECT. 4.—*Exemptions.*

Exemptions.

851. The Act is not expressly or by clear implication applicable to the Crown, and would not therefore apply to explosives under the control of the Crown. There are, however, provisions exempting Government explosive factories and stores, and His Majesty's ships, boats and carriages, and also storehouses for receiving explosives under the Volunteer Act, 1863 (*i*). The Act does not apply to the conveyance of any explosive for the purposes of the Crown (*k*).

Emergencies.

The owner or master of a ship or boat, or a carrier or warehouseman, or the person having charge of any carriage, is exempted from liability to penalty or forfeiture under the provisions of the Act or of any statutory Order thereunder (*l*) for any act done in breach of those provisions, if he prove that by reason of stress of weather, inevitable accident, or other emergency the doing of the act was, in the circumstances, necessary and proper (*m*).

Ships.

Explosives on board a ship in pursuance of the Merchant Shipping Act, 1894 (*n*), or any order or regulation made thereunder, such as gunpowder and rockets, are exempt from the Act and any statutory Order thereunder (*o*), except harbour bye-laws (*p*).

Floating magazines.

Certain floating magazines on the Mersey are also partially exempted from the provisions of the Act (*q*).

Life saving or signalling purposes.

Neither the Act nor any statutory Order (*r*) applies to the keeping of rockets for use in life-saving apparatus under the control of the Admiralty or the Board of Trade, nor to the keeping of explosives for signalling at or near a station on the sea coast, under the control of the Trinity House or the corresponding Scottish and Irish authorities (*s*).

for the production of pyrotechnic effects or pyrotechnic signals or sound signals.

The foregoing definitions are, however, subject to the proviso that a substantially constructed and hermetically closed metal case, containing not more than 1 lb. of coloured fire composition of such a nature as not to be liable to spontaneous ignition is to be deemed to be a "manufactured firework."

(*i*) 26 & 27 Vict. c. 65, s. 26. As to the application of this Act, see title ROYAL FORCES.

(*k*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 97. Explosives manufactured for the Crown in a private factory are not exempted until a Government department has taken control over them.

(*l*) For the statutory definition of "this Act," see p. 360, *ante*.

(*m*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 100.

(*n*) *Ibid.*, s. 101, refers to the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), and the amending Acts, now repealed and replaced by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60). The last-mentioned Act places certain restrictions on the shipment of explosives which are cumulative with other enactments with like objects (*ibid.*, ss. 446—450); and as to emigrant ships, see *ibid.*, s. 302, and title SHIPPING AND NAVIGATION.

(*o*) For the statutory definition of "this Act," see p. 360, *ante*.

(*p*) As to harbour bye-laws, see p. 384, *post*.

(*q*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 99.

(*r*) For the statutory definition of "this Act," see p. 360, *ante*.

(*s*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 98; and see the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 634, replacing the provisions of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), referred to in the Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 98.

SECT. 4. Exemptions.

Explosives kept for private use.

852. It is not necessary to take out a licence or to register any premises for the keeping of percussion caps, or of safety fuses for blasting, or of fog signals kept by a railway company for use on the company's railway, or of any prescribed explosive (*t*).

Part II.—Manufacture and Keeping.

SECT. 1.—*Prohibition as regards an Unauthorised Place.*

Where manufacture may be carried on.

853. Subject to certain exceptions (*u*) neither the manufacture of any explosive, nor any process of such manufacture, may be carried on except at a factory licensed for the same under the Act (*v*) or at a "lawfully existing" factory (*w*); and if (save in the excepted cases) a person manufactures an explosive or carries on any process of such manufacture at an "unauthorised place," by which is meant a place other than a duly licensed or "lawfully existing" factory, he is liable to a penalty not exceeding £100 a day for every day during which he so manufactures, and the explosives and their ingredients found in the "unauthorised place" or in the possession or under the control of the person convicted are liable to forfeiture (*x*).

Where explosives may be kept.

Subject to certain exceptions (*y*) an explosive must not be kept except (1) in the factory, whether licensed or "lawfully existing," in which it is manufactured (*z*); or (2) in a magazine or store,

(*t*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 50. The power to authorise the keeping of prescribed explosives without obtaining a licence or registering the premises has not been exercised. The section further authorises the exemption, by Order in Council, of any explosive to which the section applies, or any description thereof, from other restrictions, or the declaration that a licence shall be required for the keeping of any explosive to which it applies. Under this power percussion caps and safety fuses have been exempted from certain requirements as to the sale of explosives (see p. 381, *post*); but the power has not been exercised otherwise.

(*u*) Exceptions in favour of Government departments etc. have been mentioned (see p. 363, *ante*). The other exceptions relate to (1) small firework factories (see p. 375, *post*); (2) the filling of blasting cartridges etc. for use in mines, quarries etc. (see p. 376, *post*); (3) the filling of safety cartridges on registered premises and for private use (see pp. 378, 396, *post*); and (4) the manufacture of explosives for chemical experiments (see p. 365, *post*).

(*v*) As to the licensing of factories, see pp. 365 *et seq.*, *post*.

(*w*) As to "lawfully existing" factories, see p. 370, *post*. All buildings and places adjoining each other, and occupied together, are to be deemed to be one factory, magazine, store, or premises, and must be included in one licence or registration (Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 27).

(*x*) *Ibid.*, ss. 4, 39.

(*y*) Exceptions in favour of Government departments, lighthouse authorities, and certain magazines on the Mersey have been mentioned (see p. 363, *ante*). The other exceptions relate to (1) small firework factories (see p. 375, *post*); (2) carriers and others keeping explosives for purposes of conveyance (see p. 363, *ante*, and pp. 384, 396, *post*); (3) percussion caps, safety fuses for blasting, and railway fog signals (see *supra*); (4) explosives kept for private use (see p. 378, *post*).

(*z*) Although the express exception in favour of the keeping of an explosive in a factory is confined to the explosive there manufactured, the Home Office consider that the keeping in a factory magazine of an explosive not manufactured in the factory, but required for the manufacture or testing of the latter, may be authorised by the licence, and see definition of "factory magazine," p. 359, *ante*.

SECT. 1. Prohibition as regards an Unauthorised Place.

whether licensed (*a*) or "lawfully existing" (*b*); or (3) in premises registered under the Act for the purpose (*c*). If any explosive is kept in an "unauthorised place"—that is to say (save in the excepted cases), any place other than those above mentioned—the occupier of the place, and also the owner of, or other person guilty of keeping, the explosive is liable to a penalty not exceeding 2*s.* per pound of the explosive kept; and the explosive or any part of it may be forfeited (*d*).

Exceptions to prohibition.

854. The occupier of a factory for any explosive is not required to take out a factory licence for making up, in his factory, the explosive made thereat into cartridges or charges for cannon or blasting not containing within themselves their own means of ignition (*e*).

The prohibition against the manufacture of explosives except at a duly licensed or "lawfully existing" factory (*f*) does not apply to the manufacture of a small quantity of explosive for the purpose of chemical experiment and not for practical use or sale (*g*).

The occupier of a factory for any explosive who manufactures a new explosive or new form of explosive similar to that specified in his licence is not to be deemed to have manufactured it at an "unauthorised place" if he manufactures it on a small scale and not for sale, notifies the Secretary of State as soon as he has manufactured it, and observes the provisions of the Act and any statutory Order thereunder, including those of his licence (*h*), so far as they are applicable (*i*).

SECT. 2.—*Factories and Magazines.*

SUB-SECT. 1.—*Licences.*

Licence for new factory or magazine.

855. A new factory or magazine (*k*) for explosives may not be established except on the site and in the manner specified in a licence for the same granted under the Act (*l*).

An applicant for such a licence must submit to the Secretary of State a draft licence accompanied by a plan of the proposed factory or magazine and of its site (*m*).

(*a*) As to the licensing of magazines and of stores, see *infra*, and p. 372, *post*, respectively.

(*b*) As to "lawfully existing" magazines and stores, see p. 370 and p. 374, *post*, respectively.

(*c*) As to registered premises, see p. 374, *post*.

(*d*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 5, 39.

(*e*) *I bid.*, s. 44.

(*f*) *I bid.*, ss. 4, 39; see p. 364, *ante*, and p. 370, *post*.

(*g*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 4, 39.

(*h*) For the statutory definition of "this Act," see p. 360, *ante*.

(*i*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 45.

(*k*) For the definition of "magazine," see p. 359, *ante*; "factory" is not defined.

(*l*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 6, 39. Full details of the procedure to be followed in applying for a licence will be found in a Home Office memorandum which may be obtained from H.M. Inspectors of Explosives.

(*m*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 6, 39. The plan, which must be drawn to scale, is to be deemed to form part of the licence, and to be in the

SECT. 2. Factories and Magazines.

The draft licence must contain the terms which the applicant proposes to have inserted in the licence, and, in the case of a factory or magazine for gunpowder, must specify certain other matters (*n*).

The draft licence.

856. Where the explosive to be manufactured or kept is one other than gunpowder, the draft licence must specify such particulars as the Secretary of State may require (*o*), in addition, apparently, to particulars similar to those required in the case of a factory or magazine for gunpowder (*p*).

After examination of the proposal, the Secretary of State may reject the application, or may approve the draft licence, either with or without modification, and grant permission to the applicant to apply to the local authority for their assent to the establishment of the factory or magazine on the proposed site (*q*).

Procedure on application.

857. The local authority, upon application being made for their assent to the establishment of a new factory or magazine on the proposed site, must cause notice to be duly published by the applicant of the application and of the time and place at which they will be prepared to hear the applicant (*r*) and any persons objecting to such establishment who have, not less than seven clear days before the day of hearing, sent to the clerk of the local authority notice of their intention to appear and object, with their name, address, and calling, and a short statement of the grounds of their objection (*s*). The notice must state that the draft licence and plan, or a correct copy thereof, has been deposited for inspection by persons interested at the place and time specified in the notice, such place and time having been previously appointed by the local authority for the purpose (*t*).

Where the site of the proposed factory or magazine is within, or within a mile of, the limits of jurisdiction of any urban authority or

Act and Orders etc. under the Act included in the expression "the licence" (*ibid.*, and see the definition of "this Act," cited p. 360, *ante*). The submission of the draft to the Secretary of State may be effected by sending it by post to a Government inspector (*ibid.*, s. 85; see pp. 388, 397, *post*).

(*n*) See, for these, Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 6. They relate to the boundaries of the site, and the space surrounding it, which is to be kept free from buildings, particulars of the factory buildings and works, the nature of the processes to be carried on, with details of places where the different work is to be carried on and where the ingredients are to be kept, the amount of explosive to be allowed in any one building at a time, the situation of each factory magazine, the number of persons to be employed in each building, and any special terms required.

(*o*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 40 (1).

(*p*) The provisions of s. 40, *ibid.*, require the draft to specify such particulars as the Secretary of State may require. It is the practice to enforce the requirements specified in s. 6, *ibid.*, and in addition to require special particulars, in some cases, to meet the peculiarities of the explosive to be manufactured.

(*q*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 6, 39. The Home Office have taken the view that any modification in the draft licence must come within the matter specified in respect of the applicant's proposal. As to the appropriate local authority, see p. 360, *ante*.

(*r*) For a form of notice, see Encyclopædia of Forms and Precedents, Vol. XI., p. 120.

(*s*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 7. As to the method of publication, see *ibid.*, s. 84.

(*t*) Order of Secretary of State of 20th May, 1876.

harbour authority the applicant must also serve notice on them, if they are not the local authority, of the application and of the time and place of hearing fixed by the local authority.

The notices must be published and served by the applicant not less than one month before the hearing (*u*).

Hearing of application.

858. Upon the hearing of the application the local authority may either dissent altogether from the establishment of the factory or magazine, or may assent thereto either absolutely or on any conditions requiring additional restrictions or precautions (*x*). If they assent, the applicant is entitled to the licence applied for in accordance with the draft approved by the Secretary of State, with the addition, if the assent was on conditions, of the restrictions and precautions required by those conditions (*a*).

The costs of any objection which the local authority may deem frivolous are to be ascertained by an order made by them, and constitute a debt due from the objector to the applicant, of which the order is conclusive evidence (*b*).

Appeal.

859. If the local authority assent on conditions to which the applicant does not submit, or if they dissent, the applicant may appeal against their decision to the Secretary of State giving notice of the appeal to the local authority and requiring them to state in writing their reason for such conditions or dissent; and the Secretary of State, after considering the reasons, if any, so stated, and after such inquiry, local or other, as he may think necessary, may, if the local authority dissented, refuse the licence, or may in either case grant the licence in accordance with the draft licence, as previously approved by him, or with such modifications and additions as he may consider required to meet the reasons, if any, so stated by the local authority (*c*).

Confirmation.

The Secretary of State, when satisfied that the factory or magazine is sufficiently completed according to the licence to justify its use, must confirm the licence. Until such confirmation the licence does not come into force (*d*).

(*u*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 7, 39. The local authority must fix the time and place of hearing as soon as practicable after the application made to them; and the time so fixed must be as soon as practicable after the expiration of one month from the publication and service of the notices by the applicant. The place of hearing must be within the jurisdiction of the local authority or within a convenient distance of its limits (*ibid.*).

(*x*) For a form of assent, see Encyclopædia of Forms and Precedents, Vol. XI., p. 121. See, also, notes (*p*) and (*q*), p. 366, *ante*.

(*a*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 8, 39. The local authority must give their final decision as soon as practicable after the expiration of a month from the publication and service of the applicant's notices (*ibid.*, ss. 7, 39). If the site is within the area of two local authorities, the procedure is the same as regards each (*ibid.*, ss. 7, 39).

(*b*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 7, 39.

(*c*) *Ibid.*, ss. 8, 39. The applicant may be required to pay expenses incurred upon any inquiry made by order of the Secretary of State with respect to the grant of the licence (*ibid.*, ss. 26, 39).

(*d*) *Ibid.*, ss. 8, 39. It is not, apparently, necessary that every building authorised by the licence should be erected before the licence is confirmed. The licence may therefore be drafted so as to cover probable extensions. Certain

Factories and Magazines.

Terms of licence to be observed.

860. Neither the factory or magazine, nor any part of it, must be used for any purpose not in accordance with the licence; the terms of the licence must be observed; the manufacture must not be carried on except in accordance with those terms; the factory or magazine and every part of it must be maintained in accordance with the licence; and no material alteration in the factory or magazine by enlarging or adding to the site, externally enlarging or adding to any building, altering any mound except by enlargement, or making any new work, may be made except pursuant to an amending licence (*e*).

The occupier of a factory is not, however, to be deemed guilty of a breach of the foregoing provisions for using, in the case of emergency or temporarily, one building or part of a building in which any process of the manufacture is, under the terms of the licence, carried on, for another process of the manufacture, if he does not carry on in such building or part thereof more than one process at the same time, and if the quantity of explosive or ingredients thereof in such building or part does not exceed the quantity allowed to be therein, or any less quantity allowed to be in the building or part of a building in which such other process is usually carried on, and if upon such use being continued after the lapse of twenty-eight days from the first beginning of such use he notifies a Government inspector of such use, and the inspector does not require its discontinuance (*f*).

Rules.

861. In every factory and magazine certain "general rules" must be observed (*g*), and in addition "special rules" must be made for each factory and magazine to meet the special conditions and risks attending the particular manufacture (*h*).

General rules.

The general rules for gunpowder factories and gunpowder magazines (other than floating magazines) are contained in the Act (*i*).

The general rules for factories and magazines (other than floating magazines) for explosives other than gunpowder are contained in

fees in respect of these licences are payable to the Secretary of State. They may be fixed by him from time to time, but must not exceed those mentioned in Sched. III. to the Explosives Act, 1875 (38 & 39 Vict. c. 17) (*ibid.*, s. 26). The fees were fixed by an Order of 31st March, 1882.

(*e*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 9, 39. As to amending licences, see p. 369, *post*. The penalty for breach is forfeiture of all or part of any explosive and ingredients in any building or machine in respect of which the offence is committed, and the occupier is also liable to a penalty not exceeding £50 for the first offence and £100 for a second or subsequent offence; and in addition £50 for every day during which the breach continues. For cases of repeated infringement, see *ibid.*, s. 91.

(*f*) *Ibid.*, ss. 9, 39. If it is desired to continue to use a building, or to use it frequently, for a purpose other than that covered by the licence, an amending licence should be applied for.

(*g*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 10, 39, 40 (2).

(*h*) *Ibid.*, ss. 11, 39. See p. 369, *post*.

(*i*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 10. These rules relate to the construction, the repair, the management, and the control of the buildings.

Orders in Council (*k*), and the general rules for floating magazines are contained in Orders of the Secretary of State (*l*).

In the event of a breach, by act or default, of the general rules in any factory or magazine, all or any part of the gunpowder or other explosive or ingredients thereof in respect to which, or being in any building or machine in respect to which, the offence was committed may be forfeited, and the occupier is liable to a penalty not exceeding £10, and in addition, in the case of a second offence, £10 for every day during which the breach continues (*m*).

Special rules.

862. Every occupier of a factory or magazine must, with the sanction of the Secretary of State, make special rules for the regulation of persons managing or employed in or about the factory or magazine with a view to secure the observance of the Act (*n*), and of any statutory Order thereunder, and the safety and proper discipline of such persons, and the safety of the public. The occupier may, and if required by the Secretary of State must, with the like sanction, repeal, alter, or add to any such special rules. If an occupier, required by the Secretary of State to make, repeal, or add to any such special rules, fails duly to comply with the requisition, the Secretary of State may himself make, repeal, alter, or add to them. An occupier who feels aggrieved by a requisition of the Secretary of State, or by anything done by him as above mentioned, may require the matter to be referred to arbitration (*o*). There may be annexed to any breach of the special rules such penalties not exceeding 40*s.* for each offence as may be deemed just (*p*).

SUB-SECT. 3.—*Alteration, Devolution, and Determination of Licences.*

Alteration of licence.

863. If the occupier of a factory or magazine for explosives desires any alteration in the terms of his licence, or any material alteration in the factory or magazine by enlarging or adding to the site, or by externally enlarging or adding to any building, or by altering any mound otherwise than by enlargement, or by making

(*k*) Order in Council, No. 2 of 27th November, 1875 (as to factories); Order in Council, No. 3 of 27th November, 1875 (as to magazines); Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 40 (2). The rules in the Orders closely resemble those in s. 10 of the Act, with the omission, in the one Order, of the provisions applicable exclusively to magazines, and in the other of the provisions applicable exclusively to factories.

(*l*) Order of Secretary of State, No. 1 of November, 1875 (gunpowder magazines); Order of Secretary of State, No. 2 of November, 1875 (magazines for mixed explosives, *i.e.*, explosives other than gunpowder, whether with or without gunpowder). The rules in the Orders follow in the main those for magazines on land.

(*m*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 10, 39.

(*n*) For the statutory definition of "this Act," see p. 360, *ante*.

(*o*) As to arbitration under the Act, see p. 397, *post*.

(*p*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 11, 39. Under the words of the section referring to the proper discipline of the employees, rules requiring the observance of trade secrets have been sanctioned. In *Higham* v. *Wright* (C. P. D., 11th May, 1877), not reported, it was held that a workman who suddenly gave up his employment did not thereby render himself free from the operation of special rules whilst on the factory premises.

SECT. 2. Factories and Magazines.

any new work, he may apply for an amending licence. The procedure is the same as in the case of an application for an original licence, except that in certain cases (*q*) the Secretary of State may grant the amending licence of his own authority, without reference to the local authority (*r*).

Change of occupancy.

864. A factory or magazine licence is not avoided by any change in the occupier of the factory or magazine, but notice of the name, address, and calling of the new occupier must, within three months of the change, be sent to the Secretary of State; and in default the new occupier is liable to a penalty not exceeding 20*s.* for each week of default (*s*).

Determination of licence.

A factory or magazine licence is determined by a discontinuance for a period of two years or more of the business carried on in pursuance of the licence, or by the use of the factory or magazine for any purpose not authorised by the licence. If, however, the occupier sends to the Secretary of State, and publishes in manner directed by him (*t*), a notice to the effect that it is not intended to surrender the right to the licence, the licence will not determine until after the expiration of five years after the first discontinuance of the business, whether or not the factory or magazine has been used for any purpose not authorised by the licence (*u*).

SUB-SECT. 4.—*Continuing Certificates.*

Continuing certificates.

865. Explosives may, subject to certain conditions, be lawfully manufactured or kept, as the case may be, in a "lawfully existing" factory or magazine—that is to say, in a factory or magazine which was either in existence at the date of the Act or for which a licence had been obtained before 25th February, 1875, and for which a continuing certificate obtained from the Secretary of State is held (*a*).

(*q*) The excepted cases are (1) where the factory or magazine is carried on under a continuing certificate (Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 14, 39; and see *infra*); (2) where the Secretary of State is satisfied that the alteration desired may be properly permitted having regard to the safety of the persons employed in the factory or magazine, and will not materially either increase the danger to the public from fire or explosion, or diminish the distance of any danger building in the factory or magazine from any building or work outside and in the neighbourhood of the factory or magazine, or increase the amount of explosive allowed to be kept in the factory, magazine, or in any building in the magazine (*ibid.*, ss. 12, 39).

(*r*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 12, 39.

(*s*) *Ibid.*, ss. 13, 39.

(*t*) The practice is to require the notice to be inserted in a local newspaper (a copy of which should be sent to the Secretary of State), and posted at the entrance to the factory or magazine.

(*u*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 13, 39.

(*a*) *Ibid.*, ss. 4, 5, 39. By s. 108, *ibid.*, "existing" is defined as meaning existing at the passing of the Act, *i.e.*, on 14th June, 1875. By s. 14, *ibid.*, it was provided that a factory or magazine for gunpowder should not be deemed to be a "lawfully existing" factory or magazine unless the occupier thereof applied for and obtained a continuing certificate in respect of the factory or magazine, and the same had to be applied for within three months from the commencement of the Act, *i.e.*, from 1st January, 1876.

For the purposes of the Act and of any statutory Order thereunder (*b*), a continuing certificate is (save as otherwise expressly provided) to be deemed to be a licence, and the factory or magazine mentioned therein is to be deemed to be a factory or magazine licensed under the Act (*c*).

In the case of a gunpowder factory certain regulations with regard to the quantity of gunpowder to be allowed in various machines and parts of the factory, and other matters contained in the Act (*d*), are to be deemed to form part of the terms of the continuing certificate (*e*).

In other cases the Secretary of State is empowered to insert terms in the licence (*f*).

SUB-SECT. 5.—*Magazines of Local Authority.*

Magazines of local authorities.

866. Where any local authority under the Act (with the exception of county councils, other than the London County Council, and of certain county borough councils) satisfy the Secretary of State that the erection of a magazine by them, either within or without their jurisdiction, for the keeping of any explosive would conduce to the safety of the public within their jurisdiction, and would not be injurious to any urban authority or harbour authority out of their jurisdiction, the Secretary of State may grant a licence under the Act for the magazine (*g*).

Where the magazine is without the jurisdiction of the local authority erecting it, the assent of the local authority within whose jurisdiction it is situated is to be applied for as in other cases; and when the magazine is within the jurisdiction of the local authority erecting it, notice of the application to the Secretary of State is to be given in like manner as notice of the intention to apply for the assent of the local authority is required to be given in ordinary cases (*g*).

Payment of expenses.

867. The payments made to the local authority for the use of the magazine are to be applied in aid of the local rate, and the expenses incurred are to be defrayed out of the local rate; and the local authority are enabled to borrow for the purpose of acquiring

(*b*) For the statutory definition of "this Act," see p. 360, *ante*.

(*c*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 14, 39.

(*d*) Explosives Act, 1875 (38 & 39 Vict. c. 17), Sched. I., Part I.

(*e*) *Ibid.*, s. 14, to which reference should be made.

(*f*) *Ibid.*, s. 51. The section contains provisions as to the terms which may be inserted.

(*g*) *Ibid*, s. 72. The section is expressed as conferring the power on "any local authority other than justices in petty sessions," and therefore apparently does not extend to a county council. The local authority may, for the purposes of the licence, acquire land or any right over land, or appropriate any land or right belonging to them, and acquire or build a magazine, and may maintain and manage such magazine, and may charge for its use such reasonable sums as they may from time to time fix, with the approval of the Secretary of State. The powers under the Lands Clauses Acts, other than the compulsory clauses, are made available for the purchase of any land or right over land for the purpose of such a magazine; see, generally, title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 1.

SECT. 2. Factories and Magazines.

any land or right over land for the purposes of the magazine, or of acquiring or building the magazine (*h*).

SECT. 3.—*Stores.*

Meaning of "store."

868. The expression "store" means an existing gunpowder store (*i*), or a place for keeping an explosive licensed by a licence granted by a local authority (*k*).

Application for store licence.

869. Any person may apply for a store licence to the local authority at the time and place appointed by them, stating his name, address, and calling, the proposed site and construction of the store, and the amount of explosive he proposes to store therein; and the local authority must, as soon as practicable, if the proposed site and construction of the store and the amount of explosive are in accordance with the appropriate Order in Council, grant to the applicant, on payment of such fee, not exceeding 5*s.*, as may be fixed by the local authority, the licence applied for (*l*).

Store licence not transferable.

870. A store licence is valid only for the person named in it, and must be renewed annually. Unless the circumstances have so changed that the grant of a new licence would not be authorised, on application by post or otherwise, and on payment of such fee, not exceeding 1*s.*, as may be fixed by the local authority, the licence must be renewed by that authority, by indorsement or otherwise, for that year; and unless so renewed it expires (*m*).

Regulation of stores.

871. His Majesty may by Order in Council regulate the construction and materials and fittings of stores, prescribe the buildings and works from which stores are to be separated and the distances by which they are to be separated, and prescribe the maximum amount of explosive (in the case of gunpowder not exceeding two tons, and in the case of other explosives the prescribed amount) to

(*h*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 72. Borough councils and many harbour authorities have the alternative of borrowing under the Local Loans Act, 1875 (38 & 39 Vict. c. 83), s. 31; and borough councils have the further alternative, if the section is in force and the necessary sanction has been obtained, of borrowing by the issue of stock under the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 52; as to which, see title LOCAL GOVERNMENT. Offences in respect of these magazines may be prosecuted and tried, and the penalty and forfeiture therefor recovered, either in the county or place in which the magazine is situate or in any adjoining county or place (Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 72).

(*i*) Continuing certificates for existing gunpowder stores had to be applied for before 1st April, 1876 (Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 20; see also p. 374, *post*). If a new licence is obtained for keeping any other explosive in an existing gunpowder store, the continuing certificate determines and the store ceases to be an existing gunpowder store (Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 51).

(*k*) *Ibid.*, s. 108: in contradistinction to a place registered by the local authority.

(*l*) *Ibid.*, ss. 15, 39. If the local authority do not fix the fee, the fee payable is the maximum (*ibid.*, s. 26).

(*m*) *Ibid.*, ss. 18, 39. There are, however, provisions in the Act for the temporary keeping of the store in the event of the death, bankruptcy, or other incapacity of the occupier (*ibid.*, s. 29). As to the duty of the local authority to keep a register of store licences granted by them and inspection thereof, see *ibid.*, s. 28. The licence is to be in the form directed by the Secretary of State (*ibid.*, s. 18).

be kept in stores, graduated according to their construction, situation, and distance from the said buildings and works (*n*).

Rules for stores.

872. In every store certain general rules must be observed. The general rules relating to gunpowder stores are contained in the Act (*o*).

The general rules for stores for mixed explosives are contained in an Order in Council, and are similar in the main to those relating to gunpowder stores (*p*).

In the event of a breach (by act or default) of the general rules, all or any part of the explosive in respect to which, or being in the store when, the offence was committed may be forfeited, and the occupier is liable to a penalty not exceeding £10, and in addition, in the case of a second offence, £10 for every day during which such breach continues (*q*).

Special rules.

The occupier of a store may, with the sanction of the Secretary

(*n*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 16, 39. An Order under this power cannot require the removal of any building lawfully in use at the date of making the Order (*ibid.*). Several Orders made under this provision are in operation, namely, Order in Council, No. 5 of 27th November, 1875, which relates to gunpowder stores; No. 6 of same date, and No. 6A of 20th April, 1883, which relate to stores for mixed explosives; and Orders of 11th February, 1907, and 28th June, 1909, which amend Orders 5 and 6. Under these Orders stores are divided into four divisions, A, B, C, and D, according to the quantity of explosives allowed therein; as to these divisions reference should be made to the Orders.

(*o*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 17. These may be summarised as follows:—(1) and (2) The provisions of Orders in Council and the terms of the licence must be observed. (3) The store must be used only for keeping gunpowder and receptacles for or tools or implements for work connected therewith. (4) The interior and fittings of the store must be so constructed or so lined or covered as to prevent the exposure of iron or steel and the detaching of grit, iron, steel, or similar substance, in such manner as to come in contact with the gunpowder, and must, so far as is reasonably practicable, be kept free from grit and otherwise clean. (5) The store, unless it is made by excavation or is licensed for less than 1,000 lbs. of gunpowder, must be provided with a lightning conductor. (6) Before repairs are done to or in any part of the store, it must be cleaned by the removal of gunpowder and by washing. (7) Except after such cleansing as is mentioned in rule 6, all tools and implements used in or in repairs to the store must be of wood or copper or brass or soft metal or material or be covered with a safe and suitable material. (8) Due provision must be made by the use of pocketless working clothes, suitable shoes, searching, and otherwise to prevent the introduction into the store of fire, matches, or any substance or article likely to cause explosion or fire, or any iron, steel, or grit; but this rule is not to prevent the introduction of a proper artificial light. (9) Smoking is prohibited. (10) No person under sixteen may enter the store except in the presence and under the supervision of a grown-up person.

(*p*) Order in Council, No. 6 of 27th November, 1875, Part V., made under the Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 40 (2), (7). The rules in the Order are numbered so as to correspond with those applicable to gunpowder stores, and differ in substance from the latter in the following respects:—stores confined to the keeping of explosives of class 6, division 1, are exempted from rules 5, 6 and 7, from so much of rule 4 as applies to the exposure of iron, steel etc., and from so much of rule 8 as applies to the exclusion of iron, steel etc. Where an explosive liable to be dangerously affected by water is kept, due precautions are to be taken to exclude water from the store; and, by an additional rule (11), copies of certain rules and requirements are to be posted at the store

(*q*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 17, 39.

SECT. 3. Stores.

of State, make, and when made may with the like sanction repeal, alter, or add to, special rules for purposes similar to those for which special rules may be made by the occupier of a factory or magazine (*r*); but, unlike the latter, he is under no obligation to make special rules.

Police certificate.

If the occupier of a store licensed for mixed explosives desires to keep other than certain specified explosives, he must obtain a certificate, usually called a police certificate, that he is a fit person so to do (*s*).

Existing gunpowder stores.

873. Gunpowder may be lawfully kept in accordance with certain conditions in an existing gunpowder store, by which is meant a magazine established without a licence from a local authority in pursuance of the Gunpowder Act, 1860 (*t*), or of any enactment repealed by that Act, for the use of any mine, quarry, colliery, or factory of safety fuses, and in use at the passing of the Explosives Act, 1875 (*u*), under a continuing certificate obtained from the local authority on application made within three months from the commencement of the last-mentioned Act (*x*).

A store under a continuing certificate is subject to certain regulations contained in the Act (*a*) and to certain regulations made by Order in Council (*b*).

SECT. 4.—*Registered Premises.*

Registration of premises.

874. A person desirous of registering with the local authority any premises for the keeping of explosives may do so by registering his name and calling and the premises in such manner and on payment of such fee, not exceeding 1*s.*, as may be directed by the local authority (*c*).

The registration is valid only for the person registered, and must be renewed annually by sending, by post or otherwise, notice of such renewal to the local authority, together with such fee, not exceeding 1*s.*, as may be fixed by them (*d*).

(*r*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 19; see p. 369, *ante*. Penalties not exceeding 40*s.* for each offence may be annexed to breaches of special rules.

(*s*) Order in Council, No. 6A of 20th April, 1883. As to such certificates, see p. 379, *post*.

(*t*) 23 & 24 Vict. c. 139, amended by the Gunpowder Act Amendment Act, 1862 (25 & 26 Vict. c. 98), repealed by the Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 122, Sched. IV.

(*u*) 38 & 39 Vict. c. 17.

(*x*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 5, includes "lawfully existing" stores for gunpowder among the classes of premises on which gunpowder may be kept (see pp. 364, 370, *ante*); and see s. 20 of the Act.

(*a*) By the Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 20, the regulations in Sched. I., Part II., apply to the store as if they were contained in an Order in Council under the Act relating to stores. Breach of the regulations is consequently punishable as a breach of the general rules relating to the store by virtue of s. 17, *ibid.*, see p. 373, *ante*.

(*b*) Order in Council, No. 5 of 27th November, 1875, s. 5.

(*c*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 21, 39. It would seem that it is the occupier of or person about to occupy the premises who may register (see *ibid.*, s. 29). Fog signals may be kept by railway companies, and certain other explosives by any other person, without the premises being registered (*ibid.*, s. 50; and see p. 364, *ante*).

(*d*) *Ibid.*, ss. 21, 39.

SECT. 4. Registered Premises.

875. Certain general rules must be observed with respect to registered premises. The general rules relating to premises registered for the keeping of mixed explosives are contained in Orders in Council (*e*). Those relating to premises registered for the keeping of gunpowder only are contained in the Act (*f*). Rules relating to registered premises.

The keeping at the same time of different explosives in premises registered for the keeping of mixed explosives is regulated by provisions substantially identical with those applicable to the keeping of different explosives in stores (*g*). Certain explosives can only be kept in virtue of a police certificate (*h*), and in no circumstances may there be kept on the premises any explosive of the 5th (Fulminate) Class (*i*) or any unauthorised explosive (*k*). The explosive must be kept in one or other of two modes, and the maximum amount of explosive allowed to be kept is fixed, a larger amount being allowed according to the mode adopted. There is also provision as to the receptacle in which the explosive shall be kept (*l*).

876. In the event of any breach, by act or default, of the general rules in registered premises, all or any part of the explosive in respect of which, or being in any house, building, place, safe, or receptacle in respect to which, the offence was committed, is liable to forfeiture, and the occupier is also liable to a pecuniary penalty (*m*). Breach of rules.

SECT. 5.—*Small Firework Factories.*

877. A firework factory is not to be deemed a small firework factory if there is upon the factory at the same time: (1) more than 100 lbs. of any explosive other than manufactured fireworks and coloured fires and stars; or (2) more than 500 lbs. of manufactured fireworks, either finished or partly finished; or (3) more than 25 lbs. of coloured fires or stars not made up into manufactured fireworks (*n*). Definitions.

878. A licence for a "small firework factory" may be obtained from the local authority (*o*). The occupier of such a factory, if he has obtained such a licence, is not required to obtain a factory Grant of licences.

(*e*) Order in Council, No. 16 of 26th October, 1896, Part I.; Order in Council, No. 16A of 11th May, 1906, made under the Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 40 (2), (6), (7). Official summaries of the principal matters have also been issued.

(*f*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 22.

(*g*) Order in Council, No. 16 of 26th October, 1896, Part II., made under the Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 40 (5).

(*h*) See p. 379, *post.*

(*i*) See p. 361, *ante.*

(*k*) Order in Council, No. 16 of 26th October, 1896.

(*l*) *Ibid.*, and Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 22. These are referred to as modes A and B.

(*m*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 22, 39. The penalty is not exceeding 2*s.* for every pound of explosive in respect of which, or being on the premises in which, the offence was committed.

(*n*) *Ibid.*, s. 48.

(*o*) *Ibid.*, s. 49.

SECT. 5. Small Firework Factories.

licence from the Secretary of State (*p*), and the occupier manufacturing an explosive other than nitro-glycerine or any prescribed explosive (*q*) for the purpose only of the manufacture of coloured fires or a manufactured firework in accordance with the Act and any statutory Order thereunder (*r*), and not selling the same except in the form of coloured fires duly packed (*s*), or of a manufactured firework, is not to be deemed to manufacture an explosive in an unauthorised place (*t*).

Who may apply for a licence.

Any person may apply for a small firework factory licence to the local authority at the time and place appointed by them, stating his name, address, and calling, the proposed site and construction of the factory, and the amount and description of explosive he proposes to have therein and in any building therein. The local authority must, as soon as practicable, if the proposed site and construction of the factory and the amount of explosive is in accordance with the Order in Council (*u*) regulating small firework factories, grant to the applicant on payment of such fee, not exceeding 5*s*., as may be fixed by that authority, the licence applied for (*x*).

A small firework factory licence is valid only for the person named in it, and the provisions with respect to the renewal, expiration, and form of store licences (*y*), and the special rules for the regulation of persons managing or employed in or about stores (*a*), apply, *mutatis mutandis*, to small firework factory licences and small firework factories respectively (*b*).

Rules.

879. Small firework factories are regulated by Order in Council (*c*), which prescribes certain general rules which must be observed in every small firework factory (*d*). Breach of the foregoing general rules involves the same penalties and forfeitures as a breach of a general rule relating to stores (*e*).

SECT. 6.—*Workshops.*

Workshops.

880. The occupier of a magazine or store for any explosive is not required to take out a factory licence by reason that, in connection with the magazine or store, he, by filling cartridges making charges, drying, sifting, fitting, or otherwise, adapts or

(*p*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 48.

(*q*) The manufacture by a person having a small firework factory licence of any liquid explosive of class 3, division 1, or of any explosive of class 5, is prohibited by Order in Council, No. 4 of 27th November, 1875, Part I.

(*r*) For the statutory definition of "this Act," see p. 360, *ante*.

(*s*) As to the packing of explosives, see p. 383, *post*.

(*t*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 48.

(*u*) Order in Council, No. 4 of 27th November, 1875; see next note.

(*x*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 49. No special remedy is given to an applicant whose application for a licence is refused.

(*y*) See p. 372, *ante*.

(*a*) See p. 373, *ante*.

(*b*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 49.

(*c*) Order in Council, No. 4 of 27th November, 1875.

(*d*) *Ibid.*, Part III. These general rules are twenty-two in number, and reference should be made to them. Summaries of the principal regulations have also been officially published.

(*e*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 49; see p. 373, *ante*.

SECT. 6. Workshops.

prepares the explosive for use exclusively in his mine or quarry, or in some excavation or work carried on by him or under his control, if he observes the following regulations (*f*):—

Regulations.

(1) There must not be in the workshop in which the adaptation or preparation is carried on more than 100 lbs. of gunpowder, or the prescribed amount of any other explosive (*g*).

(2) Work unconnected with such adaptation or preparation must not be carried on in the workshop while such adaptation or preparation is being carried on (*h*).

(3) The workshop must be detached from the magazine or store, but must be in the immediate neighbourhood thereof, and at such distance therefrom as may be specified, in the case of a magazine, by the licence, and in the case of a store by an Order in Council relating to stores (*i*).

(4) An explosive of one description must not be converted into an explosive of another description, and must not be unmade or resolved into its ingredients (*k*).

(5) The occupier must give notice, in the case of a magazine, to the Secretary of State, and, in the case of a store, to the local authority, that he intends to carry on the adaptation or preparation (*l*).

Breach of regulations.

881. The foregoing regulations are to be deemed to be general rules, under the Act, relating to the magazine and store respectively, and any breach thereof is punishable accordingly (*m*).

If the adaptation or preparation carried on is of gunpowder only, the general rules applicable to gunpowder factories, and in other cases the general rules applicable to factories of other explosives, apply as if the workshop were a danger building; and any breach of such general rules is punishable in like manner as a breach of general rules with respect to a factory (*n*).

(*f*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 47. The section does not apply, except with the consent of the Secretary of State, to a magazine or store under a continuing certificate (see pp. 370, 374, *ante*). That consent may be granted absolutely or upon conditions; and any conditions imposed by the consent are to be deemed general rules relating to the magazine or store, and any breach of them is punishable accordingly (*ibid.*). As to breach of general rules relating to magazines and stores, see pp. 369, 373, *ante*.

(*g*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 47 (1). The prescribed amount in the case of an explosive other than gunpowder is, in lieu of the 100 lbs. of gunpowder if not present, 50 lbs. of any other explosive; or, in lieu of any less amount of gunpowder not present, half that amount of any other explosive (Order in Council, No. 3 of 27th November, 1875, Part III.).

(*h*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 47 (2).

(*i*) *Ibid.*, s. 47 (3). The distances in case of stores are prescribed by Order in Council, No. 6B of 11th February, 1907, amended by Order in Council of 28th June, 1909. By Order in Council, No. 6 of 27th November, 1875, the workshop is required to be at certain distances from various "protected works" and from any palace or house of residence of His Majesty.

(*k*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 47 (4). The conversion of gunpowder into "dynamite" by adding nitro-glycerine, and the extraction of nitro-glycerine from dynamite are instances of the processes prohibited.

(*l*) *Ibid.*, s. 47 (5).

(*m*) *Ibid.*, s. 47.

(*n*) *Ibid.* As to the general rules applicable to factories, see p. 368, *ante*. For the definition of "danger building," see Order in Council, No. 2 of 27th November, 1875.

SECT. 7. Rooms for Filling Cartridges.

SECT. 7.—*Rooms for Filling Cartridges.*

Rooms for filling cartridges.

882. The occupier of a magazine, store, or registered premises for any explosive is not required to take out a factory licence by reason that, in connection with the magazine, store, or premises, he fills for sale or otherwise any cartridges for small arms with the explosive, if he observes the following regulations (*o*):—

(1) There must not be in the room (*p*) in which the filling is being carried on more than 5 lbs. of the explosive, unless it is made up into safety cartridges (*q*).

(2) Work unconnected with the making of the cartridges must not be carried on in the room while the filling is being carried on (*r*).

(3) There must not be in the room while the filling is being carried on any fire or any artificial light except a light of such construction, position, or character as not to cause danger of fire or explosion (*s*).

(4) In the case of a magazine or store the room must be detached from the magazine or store, but in the immediate neighbourhood thereof and at such distance therefrom as may be specified in the case of a magazine, by the licence, and in the case of a store by any Order in Council (*a*).

(5) The occupier must give notice, in the case of a magazine to the Secretary of State, and, in the case of a store or registered premises, to the local authority, that he intends to carry on such filling of cartridges as is allowed by the foregoing provisions (*b*).

SECT. 8.—*Explosives for Private Use.*

Explosives for private use.

883. The prohibition against the keeping of explosives, except in licensed or lawfully existing magazines or stores, or in premises registered for the purpose (*c*), does not apply to a person keeping for his private use and not for sale gunpowder to an amount not

(*o*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 46. The section does not apply, except with the consent of the Secretary of State, to a magazine or store under a continuing certificate (see pp. 370, 374, *ante*). That consent may be granted absolutely or upon conditions; and any conditions imposed by the consent are to be deemed general rules relating to the magazine, store, or registered premises, and any breach of them is punishable accordingly (*ibid.*). As to breach of general rules relating to magazines and stores, see pp. 369, 373, *ante*.

(*p*) It is not clear whether more than one room may be used, but the practice is not to interfere where more than one room is used so long as the total quantity of explosive in all the rooms does not exceed that prescribed.

(*q*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 46 (1); Order in Council, No. 3 of 27th November, 1875, Part II.; Order in Council, No. 6 of 27th November, 1875, Part III.; Order in Council, No. 16 of 26th October, 1896, Part IV.

(*r*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 46 (2).

(*s*) *Ibid.*, s. 46 (3).

(*a*) *Ibid.*, s. 46 (4). The distances in the case of stores are prescribed by Order in Council, No. 5 of 27th November, 1875, s. 3; and Order in Council, No. 6 of 27th November, 1875, Part I.

(*b*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 46 (5).

(*c*) *Ibid.*, s. 5; see p. 365, *ante*.

exceeding, on the same premises, 30 lbs.; safety cartridges made with gunpowder containing not more than 150 lbs. of gunpowder; and, in the case of any other explosive, the prescribed amount (*d*).

SECT. 8. **Explosives for Private Use.**

The keeping for private use of explosives other than gunpowder or safety cartridges made with gunpowder is subject to restrictions, and the amount that may be so kept is prescribed by Order in Council (*e*).

Restrictions.

The amount of any kind of explosive kept for private use by a person in pursuance of the Order in Council is to be in substitution for the like amount of any other kind of explosive, whether gunpowder or not, which might otherwise be kept by him in pursuance of the Act or the Order, and the amount of such other kind of explosive is to be reduced accordingly. If the explosive so kept is in any other form than that of cartridges for small arms, the explosive of which the amount is so reduced is to be some explosive other than safety cartridges made with gunpowder (*f*).

The Act and statutory Orders thereunder do not apply to the filling, for private use and not for sale, of safety cartridges to the amount allowed by or under the Act to be kept for private use (*g*).

SECT. 9.—*Police Certificates.*

Police certificates for keeping explosives.

884. If the occupier of a store licensed for mixed explosives, or of premises registered for mixed explosives, or a person keeping

(*d*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 5, 39, 40 (4). Railway companies have also certain exemptions in respect of explosives for blasting and fog signals; see p. 364, *ante*.

(*e*) Order in Council, No. 12 of 20th April, 1883; Order in Council, No. 13 of 24th September, 1886. Reference to these orders should be made for their terms. The following are some of the principal provisions:—No explosive which is not an authorised explosive, and no explosive of class 5, may be kept for private use. Except under a certificate, as mentioned below, there must not be kept for private use any authorised explosive other than such amounts of gunpowder, and of safety cartridges made with gunpowder, and such percussion caps, safety fuses for blasting, and railway fog signals as are authorised by the Act, and the following amounts of certain other explosives, namely:—(1) Cartridges for small arms which are not safety cartridges, made with gunpowder, containing not more than 5 lbs. of gunpowder; (2) cartridges for cannon or blasting made with gunpowder, not containing their own means of ignition, and containing not more than 30 lbs. of gunpowder; (3) small arm nitro-compound to an amount not exceeding 10 lbs.; (4) safety cartridges made with nitro-compound and containing not more than 10 lbs. of nitro-compound; (5) fireworks not more than 5 lbs. in weight, or to an unlimited amount if obtained for immediate use and kept for a period not exceeding fourteen days in a safe and suitable place and with all due precautions for the public safety. If a person, who requires any authorised explosive, other than one of class 5, for any industrial, agricultural, sporting, or other special purpose, obtains a police certificate that he is a fit person to keep the same, he may, during the continuance of the certificate, keep for private use and not for sale the explosive specified in the certificate to an amount not exceeding, whether or not contained in cartridges, 10 lbs., and in the case of detonators, not exceeding 100 in number.

(*f*) Order in Council, No. 12 of 20th April, 1883.

(*g*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 41; and for the statutory definition of "this Act," see p. 360, *ante*.

SECT. 9. Police Certificates.

explosives for his private use, desires to keep any explosive other than gunpowder, nitro-compound adapted and intended exclusively for use in cartridges for small arms only, safety cartridges made with gunpowder or small arm nitro-compound, cartridges or charges of gunpowder for cannon or blasting, and not containing within themselves their own means of ignition, percussion caps, safety fuses, or fireworks, he must obtain a certificate, usually called a police certificate, that he is a fit person to keep, during the continuance of the certificate, such explosives as are mentioned therein (*h*).

By whom granted.

The certificate may be granted by the chief officer of police, or by some person authorised in that behalf in writing by him (*i*), or, in case of the refusal to grant any such certificate, or of the revocation of any such certificate, then such certificate may be granted by a court of summary jurisdiction for the county, or borough having a separate court of quarter sessions, in which the store or registered premises are situate, or (in the case of explosives for private use) in which the applicant resides, sitting at some court-house or place appointed for the administration of justice by such court, and may be under the hand of the clerk of the court.

Duration of certificate.

The certificate is not to continue after the end of one year from its date, nor after the grant of another certificate in respect of the same store or registered premises, or (in the case of explosives for private use) to the holder, nor after any earlier date at which the certificate, if granted by the chief officer of police or by a person authorised by him, is revoked by the chief officer, or, if granted by a court of summary jurisdiction, is revoked by a court of summary jurisdiction sitting for the same county or borough (*j*).

Part III. — Sale, Importation, and Conveyance.

SECT. 1.—*Sale.*

Hawking.

885. Explosives may not be hawked, sold, nor exposed for sale upon any highway, street, public thoroughfare, or public place; and, in case of contravention of this prohibition, the person hawking, selling, or exposing the explosive for sale is liable to a penalty not exceeding 40*s.*; and all or any part of the explosive which is so

(*h*) As to stores, see Order in Council, No 6A of 20th April, 1883, s. 2, cited p. 374, *ante*. As to registered premises, see Order in Council, No. 16 of 26th October, 1896, Part III., cited p. 375, *ante*, and as to explosives for private use, see Order in Council, No. 12 of 20th April, 1883, and the amending Order in Council, No. 13 of 24th September, 1886. The provisions in the Orders as to the obtaining etc. of the certificate in the cases of stores, registered premises, and explosives for private use, respectively, are all to a similar effect. The certificate may, in each case, be in a form scheduled to the material Order.

(*i*) See definition of "chief officer of police," p. 360, *ante*.

(*j*) See the orders above cited.

hawked or exposed for sale, or which is found in the possession of the person convicted, may be forfeited (*k*).

Sale to children.

886. Explosives may not be sold to any child apparently under the age of thirteen. Any person selling explosives in contravention of this prohibition is liable to a penalty not exceeding £5 (*l*).

Gunpowder.

887. All gunpowder exceeding 1 lb. in weight, when publicly exposed for sale or sold, must be in a substantial case, bag, canister, or other receptacle, made and closed so as to prevent the gunpowder from escaping, and, except when the same is sold to a person employed by or on the property occupied by the vendor for immediate use in the service of the vendor or on such property, the outermost receptacle containing the gunpowder must have affixed the word "gunpowder" in conspicuous characters by means of a brand or securely-attached label or other mark (*m*).

Explosives other than gunpowder.

888. The foregoing provisions apply also to explosives other than gunpowder, subject to the following exceptions and modifications:— For the 1 lb. of gunpowder limited to be exposed for sale otherwise than in the manner above indicated there is substituted—(1) where the explosive consists of safety cartridges made with gunpowder, or of an explosive of class 6, division 1, an amount containing not more than 5 lbs. of gunpowder or of any other explosive (*n*); (2) in the case of an explosive of class 7, division 2, an amount not exceeding 5 lbs. (*o*); and in lieu of the word "gunpowder" the outermost package must be marked with the name of the explosive, with the addition, except in the cases of percussion caps and safety fuses for blasting, of the word "explosive" (*p*).

Penalties.

If an explosive is sold or exposed for sale in contravention of the two last-mentioned provisions, the person selling it or exposing it for sale is liable to a penalty not exceeding 40*s.*; and all or any part of the explosive so exposed for sale may be forfeited (*q*).

(*k*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 30, 39. For the recovery of penalties, see p. 395, *post*. As to hawkers generally, see title MARKETS AND FAIRS, and as to highways and streets, see titles HIGHWAYS, STREETS AND BRIDGES; STREET TRAFFIC.

(*l*) *Ibid.*, ss. 31, 39.

(*m*) *Ibid.*, s. 32.

(*n*) Corresponding to about 420 12-bore sporting cartridges loaded with black powder, 830 loaded with a "42 grain" powder such as amberite or "schultze," or 1,050 loaded with a "33 grain" powder such as "smokeless diamond" or "imperial schultze."

(*o*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 39, 40 (4), (8); Order in Council, No. 9 of 27th November, 1875. In the case of explosives other than those mentioned in the text, the limit of 1 lb., though the same as that applicable to gunpowder, is fixed, not by the Act, but by the above cited Order in Council. The sale of specially dangerous explosives may be prohibited by Order in Council (Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 43). As to the classes of explosives, see p. 361, *ante*.

(*p*) *Ibid.*, ss. 32, 39, 40 (4), (8); Order in Council, No. 9 of 27th November, 1875. As to the provisions under which the exemption in favour of percussion caps and safety fuses has been granted, see p. 364, *ante*. Observe that the exemption is only as regards the word "explosive," and does not justify the omission of the name of the explosive.

(*q*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 32, 39. For the recovery of penalties, see p. 395, *post*.

SECT. 2. Importation.

SECT. 2.—*Importation.*

Importation.

889. With respect to the importation from any place out of the United Kingdom (*r*) of any explosive, other than explosives of certain kinds (*s*), the following provisions have effect (*t*).

The owner or master of a ship having on board any such explosive must not permit it to be unloaded and delivered to any person who does not hold an importation licence for the same from the Secretary of State; and any transhipment is for the purpose of this provision to be deemed to be delivery (*a*).

Importation licence.

The Secretary of State may grant an importation licence for any such explosive, and may annex thereto any prohibitions and restrictions with respect to the composition and quality of the explosive, and the unloading, landing, delivery, and conveyance thereof, and such further provisions and restrictions as he may think fit, for the protection of the public from danger (*b*).

The licence is of such duration as the Secretary of State may fix, and is available only for the person named in it (*c*).

Penalties.

In the event of breach, by act or default, of any of the foregoing provisions, or of the provisions of an importation licence, all or any part of the explosive with respect to which, or being in the ship or boat in connection with which, the breach is committed, may be forfeited; and the owner and master of the ship or boat and the licensee or person to whom the explosive is delivered are each liable to a penalty not exceeding £100, and to a further penalty not exceeding 2*s.* for every pound of such explosive (*d*).

Powers of Customs officers.

The Commissioners of Customs and their officers have the same powers with respect to any such explosive, and the ship containing it, as they have for the time being with respect to any article on the importation of which restrictions are for the time being imposed by the law relating to the Customs and to the ship containing the same, and the enactments for the time being in force relating to the Customs or any such article or ship apply accordingly (*e*).

Exceptions.

Gunpowder, cartridges made with gunpowder, and explosives of

(*r*) For the purposes of the Act the Isle of Man is outside the United Kingdom; see Revenue Act, 1889 (52 & 53 Vict. c. 42), s. 4.

(*s*) As to the excepted explosives, see *infra*.

(*t*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 40 (9). The importation of specially dangerous explosives may be prohibited (*ibid.*, s. 43); see p. 356, *ante*.

(*a*) *Ibid.*, s. 40 (9) (a).

(*b*) *Ibid.*, s. 40 (9) (b). A form of application for an importation licence may be purchased from the King's printers. The restrictions imposed by an importation licence usually include provisions requiring the consignment to be stored in one place, and not to be distributed until it has been examined and released by a Government inspector, and provisions to facilitate sampling, and for the due securing of cases from which samples have been taken.

(*c*) *Ibid.*, s. 40 (9) (c). In respect of every such licence granted after 1st March, 1910, a fee is payable of 10*s.* for each 2,000 lbs. or part thereof allowed to be imported under the licence, the minimum fee being £1; see Order in Council of 10th January, 1910, made pursuant to the Revenue Act, 1909 (9 Edw. 7, c. 43), s. 11, repealing in part the Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 26, 38, 39.

(*d*) *Ibid.*, s. 40 (9) (d).

(*e*) *Ibid.*, s. 40 (9) (e); and see Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), ss. 139 *et seq.*; Customs and Inland Revenue Act, 1883 (46 & 47 Vict. c. 10), s. 3; and title REVENUE.

class 6, division 1, may be imported without an importation licence (*f*).

SECT. 3.—*Conveyance.*

SUB-SECT. 1.—*Packing.*

Packing for conveyance.

890. Certain general rules must be observed with respect to the packing of explosives for conveyance (*g*).

The interior of every package must be free from grit and otherwise clean.

Subject to exceptions as regards explosives of class 6, division 1, other than pin-fire cartridges for pistols, and as regards explosives of class 7, division 2, there must not be any iron or steel in the construction of any package unless the same is covered with suitable material so as effectually to prevent the exposure of such iron or steel.

Subject to exceptions with regard to propellants (*h*) and explosives of class 6, division 1, no package when actually used for the packing of one explosive must be used for the packing of any other explosive, article or substance.

Subject to the foregoing provisions, the method of packing authorised explosives of the various classes respectively and the maximum amounts which may be in any one package are governed by regulations (*i*).

Subject to various provisoes it is also provided that on the outermost package of explosives there must be fixed in conspicuous characters by means of a brand or securely attached label or other mark, the word "explosive," the name of the explosive, the number of the class and division to which it belongs, and the name of the manufacturer or sender (*j*).

Unauthorised explosives.

An explosive which is not an authorised explosive must be packed in manner directed by a special authority with reference to such explosive (*k*).

(*f*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 40 (9). By Order in Council, No. 10A of 26th June, 1884, made under s. 43 of the Act, all explosives of class 7 (fireworks) were declared subject to s. 40 (9) of the Act, notwithstanding the exemption conferred on fireworks by that sub-section; and by Order in Council, No. 10 of 27th November, 1875, the exemption was extended to all explosives of class 6, division 1. As to the classes of explosives, see p. 361, *ante*.

(*g*) Order of Secretary of State, No. 7 of 10th June, 1904, made under the Explosives Act, 1875 (38 & 39 Vict. c. 13), ss. 33, 39, and 40 (3). S. 33 itself originally contained the general rules for the packing of gunpowder; but the section authorises the Secretary of State to alter such rules and substitute others. This Order, by virtue of powers contained in ss. 33, 40 (3), of the Act, rescinds the general rules in s. 33, and contains the general rules regulating the packing both of gunpowder and of other explosives. The penalty for breach of the rules by act or default is a fine not exceeding £20, and the explosive may be forfeited (*ibid.*, s. 33).

(*h*) A "propellant" means an authorised explosive of class 3 adapted and intended exclusively for use as a propelling charge in cannon or small arms. As to the classes of explosives, see p. 361, *ante*.

(*i*) See Order of Secretary of State, No. 7 of 10th June, 1904, r. 5, which sets out the requirements in the form of a table.

(*j*) *Ibid.*, r. 8.

(*k*) *Ibid.*, r. 7. To meet special cases exemption from observance of any one or more of the rules may be granted by special authority (*ibid.*, r. 9). For the definition of "special authority," see this Order.

Conveyance.

Powers of harbour authorities.

891. Harbour authorities are required, with the sanction of the Board of Trade, to make bye-laws for regulating the conveyance, loading and unloading of explosives within their jurisdiction, and in particular for declaring and regulating all or any of certain specified matters (*l*), which may be summarised as follows:—

Nature of bye-laws.

(1) The notice to be given by ships and boats conveying, loading, and unloading explosives as merchandise (*m*).

(2) The navigation and place of mooring of such ships and boats.

(3) The mode of stowing and keeping explosives on board such ships and boats, and of giving notice by brands, labels, or otherwise of the nature of the package containing the explosive.

(4) The description, construction, fitting up, and licensing of ships, boats, or carriages to be used for the conveyance of explosives, and the licensing and dress of persons in charge of them.

(5) The prohibition or restriction of the conveyance of explosives with other explosives or other articles or substances, or in passenger ships, boats, trains, or carriages (*n*).

(6) The prohibition of the loading or unloading of explosives, in cases in which such loading or unloading appears to be specially dangerous to the public, and the fixing of places and times at which explosives are to be loaded and unloaded, and the quantity which may be loaded, unloaded, or conveyed at one time or in one ship, boat, or carriage.

(7) The precautions to be observed in conveying explosives and in loading or unloading ships, boats, or carriages conveying explosives as merchandise, and the time which explosives may be kept during such operations.

(8) The times at which lights or fires are to be allowed on board such ships or boats, or at which a constable or officer of the harbour authority is to be on board.

(9) The publication of the bye-laws.

(10) The enforcement of the observance of the Act (*o*), and statutory Orders thereunder (*p*), by their own servants and agents, and by other persons when within the jurisdiction of the harbour authority.

(11) Generally, the protection, whether by means similar to

(*l*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 34, 39. Harbour bye-laws as to ships carrying petroleum are made under the Petroleum Act, 1871 (34 & 35 Vict. c. 105). For the general law relating to petroleum, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION. For harbour authorities, generally, see titles SHIPPING AND NAVIGATION; WATERS AND WATERCOURSES.

(*m*) For form of notice, see Encyclopædia of Forms and Precedents, Vol. VI., p. 355.

(*n*) Some harbour authorities have entirely prohibited traffic in explosives within their jurisdiction. As to whether such prohibition is *ultra vires*, see *Toronto (City) Municipal Corporation* v. *Virgo*, [1896] A. C. 88, P. C. Harbour authorities have power to provide carriages and vessels for the conveyance, loading and unloading of explosives within their jurisdiction, and may charge a reasonable sum for the use (Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 71.

(*o*) Explosives Act, 1875 (38 & 39 Vict. c. 17). For the statutory definition of "this Act," see p. 360, *ante*.

(*p*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 34, 108.

those above mentioned or not, of persons and property from danger (*q*).

Penalties both pecuniary and by way of forfeiture may be annexed to a breach or attempt to commit a breach of bye-laws made under the foregoing powers (*r*).

Power of harbour-master.

In the event of a breach of such a bye-law, in the case of any ship, boat, carriage, or explosive, whether there has or has not been a conviction for such breach, the harbour-master, or other officer or person named in the bye-laws, or any person acting under the orders of the harbour authority, may cause the ship, boat, carriage, or explosive, at the expense of the owner thereof, to be removed to such place or otherwise dealt with in such manner as may be in conformity with the bye-laws; and all expenses incurred in the removal may be recovered in the same manner as a penalty (*s*), and any person resisting the harbour-master, or officer, or other person in the removal is liable to the same penalties as a person is liable to for obstructing the harbour-master in the execution of his duty (*t*).

Power of Board of Trade to make bye-laws in place of harbour authority.

The Board of Trade are empowered, as regards parts of the coast and tidal waters for which there is no harbour authority, to make bye-laws under the powers above mentioned as if they were a harbour authority. Bye-laws so made operate as if made by a harbour authority with the sanction of the Board, and the Board may by such bye-laws define the area within which they are to be observed, and the authorities and officers by whom they are to be enforced and carried into effect, and every such authority and officer is, for the purposes of the Act and statutory Orders thereunder, other than making bye-laws or assenting to a site for a new factory or magazine, to have the same power as a harbour authority and an officer thereof have respectively under the Act and statutory Orders thereunder in a harbour (*a*).

Railway and canal companies.

892. Every railway company and every canal company over whose railway or canal any explosive is carried, or intended to be carried, are required, with the sanction of the Board of Trade, to

(*q*) Harbour bye-laws made under the powers conferred as above vary greatly in detail. For model bye-laws, see Encyclopædia of Forms and Precedents, Vol. VI., pp. 339 *et seq.*

(*r*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 34, 39. The clause with regard to penalties in s. 34 is as follows: "The penalties to be annexed to any breach or attempt to commit any breach of any such bye-laws may be all or any of the following penalties, and may be imposed on such persons and graduated in such manner as may be deemed just, according to the gravity of the offence, and according as it may be a first or second or other subsequent offence, that is to say, pecuniary penalties not exceeding £20 for each offence, and £10 for each day during which the offence continues, and forfeiture of all or any part of the gunpowder"—or other explosive (*ibid.*, s. 39)—"in respect of which, or found in the ship, boat, or carriage in respect of which, the breach of bye-law has taken place." The language of the clause is very peculiar; but it seems clear that its effect is to enable provisions imposing penalties to be inserted in the bye-laws.

(*s*) The words are in the same manner as "a penalty under this section"; but there do not appear to be any special provisions as to the meaning of penalties under the section. As to penalties under the Act generally, see p. 395, *post.*

(*t*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 34, 39.

(*a*) *Ibid.*

SECT. 3. Conveyance.

make bye-laws for regulating the conveyance, loading, and unloading of explosives on the railway or canal (*b*), and in particular for declaring and regulating certain specified matters, which may be summarised as follows:—

(1) The notice to be given of the intention to send an explosive.

(2) The mode of stowing and keeping an explosive, and of giving notice by brands, labels, or otherwise of the nature of the package containing it.

(3) The description and construction of carriages, ships, or boats to be used for the traffic.

(4) The prohibition or restriction of the conveyance of explosives with each other, or with other articles or substances, or in passenger trains, carriages, ships, or boats.

(5) The fixing of the places and times at which the explosive is to be loaded or unloaded, and of the quantity to be loaded or unloaded or conveyed at one time, or in one carriage, ship, or boat.

(6) The precautions to be observed in respect of the traffic and the time during which the explosive may be kept during conveyance, loading and unloading.

(7) The publication of the bye-laws.

(8) Enforcement of the observance of the Act and statutory Orders thereunder (*c*).

(9) Generally the protection, whether by means similar to those above mentioned or not, of persons and property from danger (*d*).

The bye-laws, when confirmed, apply to the railway, canal, agents, and servants of the company making them, and to the persons using the railway or canal, or the premises connected therewith and occupied by or under the control of the company.

Penalties, both pecuniary and by way of forfeiture, may be annexed to the bye-laws (*e*).

Wharf and dock owners.

893. The occupier of every wharf or dock on or in which any explosive is loaded or unloaded may (if not otherwise subject to such bye-laws), and if so required by the Secretary of State must, from time to time make, with the sanction of the Secretary of State, bye-laws for regulating the loading and unloading of explosives, on or in such wharf or dock. If an occupier fails to make bye-laws within three months of the receipt of a requisition from the

(*b*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 35—39; as to harbour bye-laws, see note (*l*), p. 384, *ante*. Canal companies have the same powers as harbour authorities with regard to the provision of carriages or vessels for the conveyance, loading or unloading of explosives; see note (*n*), p. 384, *ante*.

(*c*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 35, 39. The clause of s. 35 as to penalties is identical with that in *ibid.*, s. 34 (see note (*r*), p. 385, *ante*), with the substitution of the words "carriage, ship, or boat or train of carriages, ships, or boats" for "ship, boat, or carriage."

(*d*) Most of the railways of the United Kingdom have adopted a model code of bye-laws which can be obtained from the Railway Department, Board of Trade. As to carriage of dangerous or explosive goods by railway and the carriage of gunpowder and other ammunition for His Majesty's forces, see titles CARRIERS, Vol. IV., p. 27; RAILWAYS AND CANALS.

(*e*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 35, 39. The clause with regard to penalties is similar to the clause in s. 34, which refers to harbour authorities (see note (*r*), p. 385, *ante*).

Secretary of State, the latter may make such bye-laws, which are to have the same effect as if made by the occupier with the sanction of the Secretary of State. The Secretary of State has similar powers to those vested in the Board of Trade in respect of harbour bye-laws, in the matter of the repeal and amendment of any bye-laws of wharfs or docks (*f*).

Public wharves.

894. In the case of a public wharf, or a wharf which has no occupier or whose occupier is unknown, the Secretary of State himself may make bye-laws as if the occupier had failed to comply with his requisition (*g*).

Where such a wharf abuts on a harbour, railway, or canal, the harbour authority or railway or canal company have the same power, and, if required by the Secretary of State, are under the same obligation, to make bye-laws for such wharf as though they were the occupiers (*h*).

Publication of bye-laws.

895. Bye-laws framed by any railway or canal company or harbour authority, before being sanctioned by the Board of Trade, must be published in such manner as the Board direct, with a notice of intention to apply for confirmation. The Board may sanction the same with or without any omission, addition or alteration, or may disallow them. The Board must also receive and consider any objections or suggestions made by any local authority, corporation, or persons interested, and may, if they think fit, amend the bye-laws with a view to meeting such objections and suggestions without again publishing the same (*i*).

Conveyance by road etc.

Bye-laws for regulating the conveyance, loading and unloading of explosives, elsewhere than in a harbour, canal, railway, or wharf, for which bye-laws have been made under the Act (*j*), may be made by the Secretary of State, who may also rescind or amend such bye-laws from time to time (*k*).

(*f*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 36, 39. See s. 36 for the full provisions as to these bye-laws. The pecuniary penalties annexed to a breach or attempt to commit a breach of such bye-laws may not exceed £20 for each offence and £10 for each day during which the offence continues. The bye-laws may also provide for the forfeiture of all or any part of the explosive.

(*g*) *Ibid.*, s. 36.

(*h*) *Ibid.* Wharves and docks wholly within the jurisdiction of a harbour authority or forming part of a railway or canal cannot be made the subject of a separate code of bye-laws and must be provided for in the bye-laws of the harbour, railway, or canal of which they form part. See title RAILWAYS AND CANALS.

(*i*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 38, which also contains provisions as to publication of bye-laws by a Secretary of State or by the Board of Trade, and as to procedure before confirmation. Bye-laws, notices and documents directed by or under the Act to be published or advertised must, save as otherwise provided, be published in the place which they affect by advertisements in local newspapers, or by placards or handbills, or in such manner as the Secretary of State may direct (*ibid.*, s. 84).

(*j*) 38 & 39 Vict. c. 17.

(*k*) *Ibid.*, ss. 37, 39. As to publication of such bye-laws, see s. 38. General bye-laws for the conveyance of explosives by road have been made by Order of Secretary of State (No. 4), to which reference should be made. The following penalties may be imposed in the event of a breach or attempt to commit a breach of these bye-laws:—(a) forfeiture of the explosive in respect of which the offence was committed, and (b) a fine not exceeding £10 for a first offence and

Part IV.—Administration.

SECT. 1. SECT. 1.—*Government Administration.*

Government Administration.

896. For the purposes of the Act and of statutory Orders thereunder (*l*), the Secretary of State may appoint inspectors and assign them their duties (*m*).

Appointment and powers of inspectors.

Persons connected with the explosives trade or interested in it or in any patent connected with an explosive are disqualified from acting as inspectors under the Act (*n*).

To inspect premises.

A Government inspector has power to make such examination and inquiry as may be necessary to ascertain whether the Act and statutory Orders thereunder are complied with (*o*). For that purpose (1) he may enter, inspect, and examine any factory, magazine, or store, and every part thereof, at all times by day and night, but not so as unnecessarily to impede or obstruct the work in it, and may make inquiries as to the observance of the Act and statutory Orders thereunder, and as to all matters and things relating to the safety of the public or of the persons employed in or about the factory, magazine, or store (*o*); (2) he may enter, inspect, and examine any registered premises and every part thereof, in which any explosive is kept, or is reasonably supposed by him to be kept, at all reasonable times by day (*o*); (3) he may require the occupier of any factory, magazine, store, or premises which he is entitled to enter, or a person employed by such occupier therein, to give him samples of any explosive or ingredients of an

To take samples.

£20 in respect of a second or other subsequent offence. In addition to the actual offender the following persons are liable to a similar penalty, unless any such person proves that he had supplied proper means and issued proper orders for the observance and used due diligence to enforce the observance of the bye-laws, namely:—the owner of the carriage or boat, and the person in charge of it, and the person owning the explosive (Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 37). An Order of the Secretary of State (No. 4A) contains bye-laws relating to the deposit of explosives for conveyance as refuse. They require notice to be given to the dustman or person whose duty it is to remove refuse, and prohibit the deposit of explosives in receptacles for refuse and its conveyance in carriages and boats appropriated for the removal of refuse; see p. 394, *post.*

(*l*) 38 & 39 Vict. c. 17.

(*m*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 53. The expression used in this section is "this Act," with regard to which see *ibid.*, s. 108; and see statutory definition, p. 360, *ante.* An annual report of the proceedings under the Act must be prepared by such inspectors as the Secretary of State directs, and laid before both Houses of Parliament (*ibid.*, s. 57). The salaries of Government inspectors, and expenses incurred by the Secretary of State or Government inspectors in carrying the provisions of or under the Act into execution, are defrayed out of moneys provided by Parliament (*ibid.*, s. 62). The order appointing a Government inspector must be published in the *London Gazette* (*ibid.*, s. 53).

(*n*) *Ibid.*, s. 54, to which reference should be made.

(*o*) *Ibid.*, s. 55. For the statutory definition of "this Act," see p. 360, *ante.* The occupier of the factory, magazine, store, or registered premises, his agents and servants, must furnish the means required by the inspector as necessary for the entry, inspection, examination and inquiry. Penalties, not exceeding £100 for each offence, are imposed on any person failing to permit the inspector to enter etc., failing to comply with requirements of the inspector under the section, and obstructing the inspector in the execution of his duties under the Act or Orders etc. made in pursuance of the Act (*ibid.*). As to payment for samples taken, see *ibid.*, s. 76.

explosive therein, or of any substance therein, the keeping of which is restricted or regulated by or under the Act, or of any substance therein which the inspector believes to be an explosive or such ingredients or substance (*p*).

To order remedy for defects.

If in any matter which is not provided for by any expressed provision of the Act or of any statutory Order thereunder, an inspector finds any factory, magazine, or store, or any part thereof, or anything or practice therein, or connected therewith, to be unnecessarily dangerous or defective, so as in his opinion to tend to endanger the public safety or the bodily safety of any person, he may require the occupier of the factory, magazine, or store to remedy the same (*q*).

Conveyance of samples.

897. A Government inspector, and any other person authorised by him for the purpose, may keep and convey any sample taken for the purposes of the Act or of statutory Orders under it or by the authority of the inspector, so that the amount of it does not exceed what is reasonably necessary for the purpose of enabling the inspector to perform his duties under the Act (*r*), and the same must be kept and carried with all due precautions to prevent accident. Such inspector or person is not liable to any penalty, punishment, forfeiture, or liability under the Act or any other Act for keeping or conveying such sample.

Inspection of railways and canals

898. Persons acting under the Board of Trade as inspectors of railways may be ordered by the Board to inquire into the observance of the Act by any railway company or canal company, and generally to act with respect to any railway or canal as an inspector under the Act (*s*).

Harbours and ships.

Board of Trade inspectors under the Merchant Shipping Act, 1894 (*t*), may be similarly ordered to act with respect to harbours and ships (*u*).

(*p*) See note (*o*), p. 388, *ante*.

(*q*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 56. If the occupier objects to comply with the requisitions, he may require the matter to be referred to arbitration. No person is to be precluded by any contract from doing such acts as may be necessary to comply with the requisition or award; and no person is liable under any contract to any penalty or forfeiture for doing those acts, if he gave notice of the contract to the inspector at or before the time at which the inspector made the requisition or to the arbitrators before the award was made (*ibid.*). An occupier failing to comply with a requisition or award within twenty-one days after the expiration of the time for requiring the matter to be referred to arbitration if there is no reference to arbitration, or, if there is a reference, after the date of the award, is liable to a penalty not exceeding £20 for every day during which he so fails. The court, if satisfied that the occupier has taken active means for complying with the requisition or award, but has not with reasonable diligence been able to complete the works, may adjourn the proceedings, and if the works are completed within a reasonable time in the opinion of the court, no penalty is to be inflicted (*ibid.*).

(*r*) *Ibid.*, s. 61.

(*s*) *Ibid.*, s. 58 (a). For the statutory definition of "this Act," see p. 360, *ante*. For the appointment of such inspectors, see title RAILWAYS AND CANALS.

(*t*) 57 & 58 Vict. c. 60, repealing and re-enacting the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104); see p. 363, *ante*. As to Board of Trade inspectors, see title SHIPPING AND NAVIGATION.

(*u*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 58 (b).

SECT. 1. Government Administration.

Whilst any such order is in force such inspectors have the powers of a Government inspector of explosives (*a*).

Home Office inspectors of mines may be similarly ordered by the Secretary of State to act as inspectors under the Act (*b*) in respect of magazines and stores established by the owner of the mine for the purposes of any mine subject to the Coal Mines Regulation Act, 1887 (*c*), or the Metalliferous Mines Regulation Act, 1872 (*d*).

Fees.

899. There must be paid in respect of licences and continuing certificates granted by the Secretary of State such fees as are fixed by him, with the consent of the Treasury. These fees are carried to the Consolidated Fund (*e*).

SECT. 2.—*Local Administration.*

Duty of local authorities.

900. Local authorities (*f*) are obliged to carry into effect their powers under the Act relating to the manufacture, keeping, sale, conveyance, and importation of explosives (*g*).

Local authorities may authorise officers to carry out the duties imposed on them (*h*). Power is given to appoint "superior officers" who are given extended powers in respect of the conveyance, loading, unloading and importation of explosives (*i*). An officer of the local authority may on production, if demanded, of a copy of his authority purporting to be duly certified, or of some other sufficient evidence of his authority, require the occupier of any store, not being subject to inspection under the Act of any inspector of mines (*k*), registered premises, or small firework factory, to show him every or any place and all or any of the receptacles in which any explosive or ingredient of any explosive, or any substance, the keeping of which is restricted or regulated by the Act, that is in his possession, is kept (*l*). He may require the occupier to give him samples of such explosives, ingredients and substances, or of any substance which the officer believes to be an explosive or such ingredient or substance, but must tender payment for them (*m*). He has also certain general powers of search (*n*).

(*a*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 58.
(*b*) *Ibid.*, s. 59.
(*c*) 50 & 51 Vict. c. 58.
(*d*) 35 & 36 Vict. c. 77. As to inspectors of mines, see title MINES, MINERALS AND QUARRIES.
(*e*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 26, amended as to importation licences by the Revenue Act, 1909 (9 Edw. 7, c. 43), s. 11. The fees must not exceed those mentioned in the Third Schedule to the Act. Expenses in respect of the grant of a new licence are also payable (*ibid.*); see p. 367, *ante*.
(*f*) For meaning of "local authorities," see p. 360, *ante*.
(*g*) See pp. 366, 372, 374, 375, 380, 382, 387, *ante*, and p. 391, *post*.
(*h*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 69, 75.
(*i*) *Ibid.*, s. 75; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (x.).
(*k*) See *supra*.
(*l*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 69. An occupier not complying with any lawful requisition or guilty of wilful obstruction is liable to a penalty not exceeding £20 (*ibid.*). For the statutory definition of "this Act," see p. 360, *ante*.
(*m*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 69, 76. The payment or tender must be what the inspector considers the fair market value, but s. 76 provides means by which the owner may recover the real value; and see p. 393, *post*.
(*n*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 73—75; and see p. 391, *post*.

Payment of expenses.

901. All expenses incurred by any local authority in carrying into effect the execution of the Act, including the salary and expenses of any such officer, are to be paid out of the local rate (*o*).

Local authorities are entitled to charge certain fees for licences, certificates and other matters. Such are payable in respect of stores, registered premises, and small firework factories (*p*). The fees payable, with one exception, must be carried to the credit of the local rate or otherwise disposed of as such local authority may direct (*q*).

SECT. 3.—*Powers of Search.*

Powers of search.

902. General powers of search are conferred on Government inspectors, constables, and officers of the local authority. If a Government inspector or any other of these officers, if such officer is specially authorised either by a warrant of a justice (*r*), or, in cases of emergency, by a written order from a superintendent or police officer of equal or superior rank, or from a Government inspector (*s*), has reasonable cause to believe that any offence has been or is being committed with respect to any explosive in any place (*t*), or that any explosive is in any such place in contravention of the Act, or that the provisions thereof are not duly observed in any such place, such officer may, on producing, if demanded, in the case of a Government inspector, a copy of his appointment, and in the case of any other officer his authority (*u*), enter the said place, if needs be by force, at any time (*a*) and examine the place, and search for and take samples (*b*) of any

(*o*) Where the county council is the local authority the local rate will be the county fund; in a borough the local rate is the borough fund or borough rate; in a harbour any moneys, fund, or rate applicable or leviable by the harbour authority for any harbour purposes (Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 70). As to rates generally, see title RATES AND RATING.

(*p*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 15, 21, 49. These sections prescribe the maximum fees, but, subject to these, the local authority may fix the fee. If they do not fix a fee the fee payable is the maximum (*ibid.*, s. 26).

(*q*) *Ibid.*, s. 26. The exception is where the clerk to the authority is wholly paid by fees, in which case, unless the local authority otherwise direct, the fees are paid to the clerk.

(*r*) A justice may grant a warrant upon reasonable ground being assigned on oath (Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 73). A Government inspector on his own authority has the same powers as a constable empowered by a search warrant.

(*s*) A superintendent or other such officer or a Government inspector may give a written order where it appears to him that the case is one of emergency and that the delay in obtaining a warrant would be likely to endanger life (*ibid.*).

(*t*) By "place" is meant a place whether a building or not, or a carriage, boat, or ship (*ibid.*).

(*u*) *I.e.*, his search warrant or written order.

(*a*) This includes Sundays (*ibid.*). A person who by himself or others fails to admit into any place occupied by him or under his control, or in any way obstructs an officer, is liable to a penalty not exceeding £50, and also to forfeit all explosives and ingredients thereof which are at the time of the offence in his possession or under his control in the said place (*ibid.*).

(*b*) As to paying for samples, see p. 393, *post*.

SECT. 3. Powers of Search.

explosive and ingredient, or of any substance reasonably supposed to be an explosive, or of such ingredient which may be found therein (*c*).

When a constable or officer of the local authority so enters and searches under a written authority as mentioned above, a special report in writing of every act done by him in pursuance of that authority and of the grounds on which it was done must be forthwith sent by the person by whom or under whose authority it was done to the Secretary of State (*d*).

If such officer has reasonable cause to believe that any explosive or ingredient of an explosive or substance found by him is liable to be forfeited under the Act, he may seize and detain the same until some court of summary jurisdiction has determined whether or not the same is so liable to be forfeited (*e*).

Powers of entry or examination.

903. Government inspectors, chief officers of police, and superior officers specially appointed for the purposes of the Act by local

(*c*) By virtue of the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 35, and the Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 86, every superintendent or inspector of the metropolitan police force, with such constables as he thinks necessary, may, at any time between sunrise and sunset, enter any vessel, except His Majesty's ships, in the river Thames or the docks or creeks adjacent thereto, and exercise the same powers of search and seizure, detention and removal of explosives, as may be exercised by a Government inspector under the Explosives Act, 1875 (38 & 39 Vict. c. 17); and see title POLICE.

(*d*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 73. The Secretary of State referred to is the Secretary of State for the Home Department (*ibid.*, s. 108).

(*e*) *Ibid.*, s. 74. The following is a summary of the provisions relating to seizure :—(1) The officer seizing may require the occupier of the place in which the explosive was seized to detain it in any place under such occupier's control (*ibid.*, s. 74 (1)); (2) or may remove it to some place where it will least endanger the public safety, and there detain it (*ibid.*); (3) he must bring the matter before a court of summary jurisdiction as soon as practicable (*ibid.*, s. 74 (2)); (4) he may seize, detain, and remove any receptacle containing the seized explosive (*ibid.*, s. 74 (3)); (5) he may use for the removal and detention of the explosive any vehicle, such as a vessel or boat, in which it was seized, paying the owner reasonable compensation for such use. In case of dispute with regard to the amount of compensation, the question may be taken before a court of summary jurisdiction for settlement (*ibid.*, s. 74 (4)); (6) so far as practicable, the explosive must be kept and conveyed in accordance with the provisions of or made under the Act, but, provided that all due precautions are taken for the prevention of accidents, the officer seizing is not liable to any penalty or any damages for keeping or conveying the explosive (*ibid.*, s. 74 (5)); (7) the officer seizing in pursuance of s. 74 is not liable to damages in respect of such seizure or dealing, unless it is proved that he has made the seizure without reasonable cause, or by wilful neglect or default caused damage to the article seized (*ibid.*, s. 74 (6)); (8) an occupier who, by himself or others, fails to keep an explosive when required to do so in pursuance of s. 74, or who, except with the authority of the officer seizing the same, or of a Government inspector, or, in case of emergency, for the purpose of preventing explosion or fire, removes, alters, or in any way tampers or deals with the explosive, is liable to a penalty not exceeding £50, and to forfeiture of all explosives and ingredients (*ibid.*, s. 74 (1)). Where the officer seizing is a Government inspector, or is authorised by an order from a Government inspector or a justice of the peace, or from a superintendent or other officer of police of equal or superior rank, he may, where the matter appears to him to be urgent and fraught with serious public danger, cause the explosive to be destroyed or otherwise rendered harmless, but before doing so he must take and keep a sample and, if required, give a sample to the person owning or having the explosive under his control (*ibid.*, s. 74 (1)).

SECT. 3. Powers of Search.

authorities may, for the purpose of ascertaining whether the provisions of the Act with respect to the conveyance, loading, unloading, and importation of an explosive are complied with, enter, inspect, and examine at any time, including Sundays, the wharf, carriage, ship or boat of any carrier or other person who conveys goods for hire, or of the occupier of any factory, magazine or store, or of the importer of any explosive, where he has reasonable cause to suppose an explosive to be for the purpose of conveyance, but not so as unnecessarily to obstruct work or business (*f*). If an offence is being committed, he may seize and detain or remove the carriage, ship or boat, or the explosive, so as to remove any danger to the public, and may seize and detain the explosive as if it were liable to forfeiture (*g*).

Payment for samples taken.

904. Where a Government inspector, constable, or officer of the local authority takes a sample of any explosive or ingredient or substance, he must pay or tender payment for the same to such amount as he considers to be the market value thereof, and the occupier of the place in which, or owner of the bulk from which, the sample was taken may recover any excess of the real value over the amount so paid or tendered and the amount so tendered from the officer taking the sample as a debt in the county court of the district from which the sample was taken (*h*).

Part V.—Offences and Legal Proceedings.

SECT. 1.—*Offences.*

Other offences.

905. In addition to the offences in connection with the manufacture, keeping, sale, importation, and conveyance of explosives, there are other offences punishable under the Act (*i*).

Trespass.

A person trespassing upon a factory, magazine or store, or upon the land immediately adjoining thereto, occupied by the occupier of the factory, magazine or store, or on a wharf for which bye-laws are made under the Act, is liable, if not otherwise punishable, to a penalty not exceeding £5, and may be forthwith removed by any constable, or by any agent or servant of the occupier (*j*).

(*f*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 75. For the statutory definition of "this Act," see p. 360, *ante*. These officials and any police officer and any officer of a local authority may, if they have reasonable cause to suppose that an offence is being committed in respect of any carriage (not being on a railway), or any boat conveying, loading, or unloading an explosive, and that the case is one of emergency, and that delay in obtaining a warrant is likely to endanger life, stop and enter, inspect and examine such carriage or boat, and take precautions necessary for removing the danger (*ibid.*, s. 75). Every officer for the purpose of s. 75 has the same powers and is in the same position as if he were authorised by a search warrant, and any person failing to admit or being guilty of an obstruction is liable to the same penalty (*ibid.*; and see note (*a*), p. 391, *ante*).

(*g*) *Ibid.*, s. 74; see also note (*e*), p. 392, *ante*.

(*h*) *Ibid.*, s. 76.

(*i*) Explosives Act, 1875 (38 & 39 Vict. c. 17).

(*j*) *Ibid.*, s. 77; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 776. The occupier is required to post up in a conspicuous place a notice warning

SECT. 1. Offences.

Acts tending to cause explosion.

If any person other than the occupier of, or a person employed in, any factory, magazine or store is found committing an act tending to cause explosion or fire in or about the factory, magazine or store, he is liable to a penalty not exceeding £50 (*k*).

A person found committing an act for which he is liable to a penalty under the Act, and which tends to cause explosion or fire in or about a factory, magazine, store, railway, canal, harbour, wharf, carriage, ship or boat, may be apprehended without warrant by a constable or an officer of the local authority, or by the occupier or any agent or servant of his, or person authorised by him, and conveyed as soon as conveniently may be before a court of summary jurisdiction (*l*).

Sentence of imprisonment.

906. If the court considers that any offence, punishable by a pecuniary penalty only, was reasonably calculated to endanger the safety of, or to cause serious personal injury to, any of the public or those employed, or to cause a dangerous accident, and that it was committed wilfully by the personal act, default, or negligence of the accused, and that a pecuniary penalty will not meet the case, the accused may be sentenced to imprisonment, with or without hard labour, for not more than six months (*m*).

Destruction of notices etc.

907. Any person who without due authority pulls down, injures or defaces any notice, copy of rules or document affixed in pursuance of the Act, or of any special rules, is liable to a penalty not exceeding £2 (*n*).

Throwing fireworks.

908. Throwing, casting, or firing any fireworks in highways, streets, thoroughfares, or other public places are offences punishable summarily (*o*).

Placing explosives in public places.

909. Depositing an explosive in a receptacle or place appropriated for refuse, or handing or forwarding an explosive to a dustman or other person employed in the removal of refuse without notice, is an offence (*p*). It is also an offence to convey an explosive in a carriage or boat appropriated for the removal of refuse (*q*).

Other offences.

910. Offences in regard to explosives are also created by other statutes. It is an offence punishable summarily to use dynamite

persons of the penalties attaching to trespass. The absence of such a notice does not, however, exempt a trespasser from penalty (Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 77).

(*k*) *Ibid.* The provision mentioned in the preceding note applies also to this offence.

(*l*) *Ibid.*, s. 78.

(*m*) *Ibid.*, s. 79. As to the penalties which may be inflicted by a court of summary jurisdiction, see *ibid.*, s. 91, and p. 395, *post.*

(*n*) *Ibid.*, s. 82. As to forgery, signature of, and making use of such documents, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 761.

(*o*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 80; Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 28; Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 54; Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 72; and see, generally, titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 775—777, and STREET TRAFFIC.

(*p*) Order of Secretary of State, No. 4A of 28th October, 1904 (1). For a first offence a penalty not exceeding £10 may be inflicted; for a second or subsequent offence £20 is the maximum penalty (*ibid.*).

(*q*) *Ibid.* (2). The penalties are the same as under *ibid.* (1).

or other explosive for the catching or destruction of fish (*r*), and it is a misdemeanour to place or attempt to place in or against any post office letter-box any explosive or dangerous substance, or to send or attempt to send a postal packet which encloses any explosive substance (*s*).

The malicious use of explosives to cause injury to life or property is dealt with in the Explosive Substances Act, 1883 (*t*).

SECT. 2.—*Legal Proceedings.*

Legal proceedings and recovery of penalties.

911. Offences under the Act (*a*) may be prosecuted, penalties recovered, and forfeitures inflicted either on indictment, or before a court of summary jurisdiction in manner directed by the Summary Jurisdiction Acts (*b*). Such a court, however, cannot inflict a fine (exclusive of costs and of forfeiture or penalty in lieu thereof) exceeding £100, nor impose a longer term of imprisonment than one month (*c*). When a person appears before a court of summary jurisdiction charged with an offence under the Act for which the maximum penalty, exclusive of forfeiture, exceeds £100, he may object to being tried by such court. The court may then deal with the case as if the accused were charged with an indictable offence (*d*) If the sum adjudged to be paid by a court of summary jurisdiction including forfeiture and costs, exceeds £20, an appeal may be made to quarter sessions (*e*).

Prohibition order by court.

912. A court of summary jurisdiction may by order prohibit a person from doing any act for which he has been twice convicted under the statute, and impose imprisonment not exceeding six months for disobedience to such order (*f*).

(*r*) Fisheries (Dynamite) Act, 1877 (40 & 41 Vict. c. 65), s. 2; Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 12; see title FISHERIES, p. 612, *post*.

(*s*) Post Office Act, 1908 (8 Edw. 7, c. 48), ss. 61, 63; and see title POST OFFICE.

(*t*) 46 & 47 Vict. c. 3; see p. 400, *post*, and title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 775.

(*a*) For statutory definition of "this Act," see p. 360, *ante*.

(*b*) Namely, Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43); Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), and Acts past or future amending the same.

(*c*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 91. All costs and money directed to be recovered as penalties may be recovered before a court of summary jurisdiction in manner directed by the Summary Jurisdiction Acts; see title MAGISTRATES. A harbour, tidal water, or inland water which runs between, or abuts on, or forms the boundary of the jurisdiction of two or more courts is deemed to be within the jurisdiction of each court. Any tidal water not included in the foregoing descriptions and within the territorial jurisdiction of His Majesty, and adjacent to or surrounding any part of the shore of the United Kingdom, and any pier, jetty, mole or work extending into the same, is deemed to form part of the shore to which such water or part of the sea is adjacent or which it surrounds (*ibid.*, s. 90); and see title WATERS AND WATERCOURSES. For the constitution of a court of summary jurisdiction, see Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 94, and see title COURTS, Vol. IX., pp. 74 *et seq.*, and, generally, title MAGISTRATES. As to evidence of licences and special rules, see Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 60.

(*d*) *Ibid.*, s. 92.

(*e*) *Ibid.*, s. 93. For procedure see Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31; and title MAGISTRATES.

(*f*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 91.

SECT. 2. Legal Proceedings.

Liability of occupier.

913. Where an occupier is liable to a penalty under the Act for an offence which has in fact been committed by some other person, such other person is liable to a penalty not exceeding £20. In such cases the occupier will be exempt from penalty and forfeiture if he proves (1) that he had supplied proper means, issued proper orders and used due diligence to enforce the observance of the Act; (2) that the offence was actually committed by some other person without his connivance; and (3) that he has taken all practical means in his power to prosecute such actual offender, if alive, to conviction (*g*).

Where a Government inspector, officer of a local authority, or a local authority is satisfied before instituting proceedings against an occupier that such occupier would be exempt from penalty or forfeiture under the foregoing provisions if proceedings were taken against him, and the occupier gives all facilities for proceeding against and convicting the person believed to be the actual offender, proceedings must be taken against the latter, without first proceeding against the occupier (*h*).

Liability of carriers.

Where a carrier or owner or master of a ship or boat is prevented from complying with the Act by the wilful act, neglect or default of a consignor or consignee of an explosive or other person, or by improper refusal to accept delivery, then the consignor, consignee or other person so guilty is liable to the same penalty as that to which the carrier, owner or master is liable for breach of the Act. Conviction of the offender exempts the carrier, owner or master from any penalty or forfeiture (*i*).

A penalty inflicted on the owner or master of a ship or boat for an offence committed in relation to such ship or boat may be levied by distress or arrestment and sale of the ship or boat and her tackle (*k*).

If the court consider it just and expedient, it may, in lieu of forfeiting any explosive, inflict an additional penalty not exceeding such sum as appears to the court to be the value of the explosive liable to forfeiture (*l*).

An indictment, information, or complaint may be laid against the owner of any explosive or ingredient alleged to be liable to be forfeited for the purpose only of enforcing such forfeiture (*l*).

The Act does not, in general, exempt a person from an action or

(*g*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 87. This section also applies to a warehouseman, carrier, occupier of a wharf or dock, or owner or master of any ship, boat, or carriage.

(*h*) *Ibid.* An occupier or other defendant when charged in respect of an offence by another person may, if he think fit, be sworn and examined as an ordinary witness in the case.

(*i*) *Ibid.*, s. 88. This provision can only be applicable when the consignor is within the jurisdiction of the courts.

(*k*) *Ibid.*, s. 95. This is in addition to any other power of compelling payment; and see titles ADMIRALTY, Vol. I., p. 85; DISTRESS, Vol. XI., pp. 221 *et seq.*

(*l*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 89. Where the owner is unknown or cannot be found, the court may cause a notice to be advertised stating that unless cause is shown to the contrary at the time and place mentioned in the notice, the explosive will be forfeited, and the court may at such time and place, after hearing the owner or any person on his behalf (who may be present), order all or part to be forfeited.

suit in respect of a nuisance, tort or otherwise which might, but for the provisions of the Act, have been brought against him. It does not exempt a person from indictment or other proceeding for a nuisance, or for an offence indictable at common law or by any other Act, but so that no person is punished twice for the same offence (*m*).

SECT. 3.—*Miscellaneous.*

Application of penalties.

914. All penalties imposed by or under the Act (*n*) by a court of summary jurisdiction upon the prosecution of a Government inspector and the proceeds of the sale of forfeited explosives or ingredients in such cases must be paid into the Exchequer and carried to the Consolidated Fund (*o*).

For the purpose of the sale or disposal of forfeited explosives or ingredients the court may requisition the vessel or carriage containing such explosive or ingredient from the owner on payment of reasonable compensation (*p*), as may also the Secretary of State should he assume the direction of the disposal or sale. Where the explosive or ingredient is directed to be destroyed, corresponding provisions exist for the detention of the vessel or carriage if necessary (*o*).

Notices.

915. Notices and documents which are required by the Act to be served, given, or sent by, on, or to a Government inspector or Secretary of State may be sent by post by a prepaid letter, and if so sent are to be deemed to have been served, given, and received respectively at the time when the letter containing the same would be delivered in the ordinary course of the post, and to prove such service, giving, or sending it is sufficient to prove that the letter was properly addressed and prepaid and put into the post. Notices and documents to be given or sent to a local authority may be sent by post or otherwise to the clerk or office of the local authority or delivered to some person employed by them for the purpose of the Act (*q*).

Arbitration.

916. An occupier authorised by the Act (*r*) to require any matter to be referred to arbitration may, within one month after receiving

(*m*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 102. When proceedings are taken in respect of an offence under the Act, which is also indictable at common law, or by some other Act, the court may direct that proceedings shall be taken for indicting the offender at common law or under such other Act. As to nuisances and torts, generally, see titles NUISANCE; TORT.

(*n*) See definition of "this Act," p. 360, *ante*.

(*o*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 96. Any forfeited explosive or ingredient and any receptacle containing the same may be sold, destroyed, or otherwise dealt with as the court declaring the forfeiture or the Secretary of State may direct. As to disposal of penalties where prosecutor is not a Government inspector, see title MAGISTRATES.

(*p*) In cases of dispute as to the amount of compensation payable the question may be determined by a court of summary jurisdiction (Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 96).

(*q*) *Ibid.*, s. 85. A notice or document required to be sent to the Secretary of State may be sent to a Government inspector (*ibid.*). Bye-laws, notices, and documents, are published by advertisement in local newspapers or by placards and handbills, or in such manner as the Secretary of State may direct (*ibid.*, s. 84; and see also p. 387, *ante*). As to proof of posting in general, see title EVIDENCE, Vol. XIII., p. 556.

(*r*) Explosives Act, 1875 (38 & 39 Vict. c. 17).

SECT. 3. Miscellaneous.

the requisition, notice, or document relating to the matter to be so referred, send an objection thereto to the Secretary of State; and if the cause of such objection is not, within one month after such objection is received by the Secretary of State, removed by the Secretary of State waiving or varying the requisition, notice, document, or matter, or otherwise (which the Secretary of State is authorised to do), such occupier may, by notice sent within seven days after the expiration of the month to the Secretary of State, require the matter to be referred to arbitration, and the date of the receipt by the Secretary of State of the last-mentioned notice is to be deemed to be the date of reference (*s*).

Part VI.—Accidents.

SECT. 1.—*Notification.*

Notification.

917. The occupier of a factory, magazine or store must forthwith notify the Secretary of State or a Government inspector of any accident by explosion or fire which occurs in or about or in connection with such premises whether personal injury or loss of life is caused or not. The injuries or loss of life, if any, must be detailed in the notice. With regard to registered premises like notice must be sent, but only in cases where loss of life or personal injury is involved. An accident thus notified need not be reported to an inspector of factories or mines (*a*).

Accident on conveyance or vessel.

If an accident by explosion or fire occurs in or about or in connection with a carriage, ship, or boat conveying an explosive, or on or from which an explosive is being loaded or unloaded, and causes loss of life or personal injury, or if the amount of the explosive conveyed or being so loaded or unloaded exceeds in the case of gunpowder half a ton, and in the case of any other explosive 200 lbs. (subject to an exemption of certain ammunition), the owner or master of the carriage, ship or boat, and the owner of the explosive concerned, or one of them, must notify the Secretary of State or a Government inspector of the accident and of any loss of life or personal injury, if any, occasioned thereby (*b*).

Reconstruction after accident.

918. Where an accident by explosion or fire has occurred in, and wholly or partly destroyed, a factory magazine, or any magazine or

(*s*) Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 25, 108. For provisions as to the conduct of the arbitration, see Sched. II. to the Act.

(*a*) *Ibid.*, s. 63. It is customary, but not obligatory, to leave the *débris* untouched for the Government inspector. An occupier who fails to comply with the section is liable to a penalty not exceeding £20 (*ibid.*). Occupiers must take all due precautions for the prevention of accidents by fire and explosion and for preventing unauthorised persons having access to the premises (*ibid.*, s. 23). The occupier and persons employed must abstain from any act which tends to cause fire or explosion and which is not reasonably necessary for the purpose of the work carried on. As to reporting to inspectors of factories and mines, see titles FACTORIES AND SHOPS; MINES, MINERALS AND QUARRIES.

(*b*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 63, and Order in Council, No. 11 of 27th November, 1875. See note (*a*), *supra*, for penalty for non-compliance with the section. The exemption mentioned is where no explosive is

store (*c*), the same must not be reconstructed nor any further supply of explosive put therein except with the permission of the Secretary of State (*d*). The magazine of a factory in any factory under a continuing certificate (*e*) may be reconstructed upon such site in the factory and with such precautions as the Secretary of State may deem reasonable, regard being had to the working of the factory as well as to the safety of the public and persons employed therein (*f*). SECT. 1. Notification.

When two or more buildings in a factory have been wholly or partially destroyed by explosion or fire, not more than one may be reconstructed except with the permission of the Secretary of State. This provision does not apply to buildings in a factory under a continuing certificate, if they are incorporating mills or if, as regards any other buildings, a Government inspector has not previously notified the occupier that the buildings are unduly near to each other (*f*).

Where one building in a factory has been wholly or partly destroyed and a Government inspector has previously notified the occupier that the building is unduly near to some building or work outside the factory, reconstruction may take place only upon such site and with such precautions as the Secretary of State deems reasonable (*f*).

Where a building is lawfully reconstructed on a different site, the Secretary of State must make the necessary alterations in the licence (*g*).

SECT. 2.—*Coroners' Inquests.*

919. Special provision is made for inquests held upon the body of any person whose death shall have been caused by any accident which has to be reported (*h*) under the Act (*i*), or from an explosion of any explosive (*j*). Inquests.

conveyed, loaded, or unloaded, other than ammunition of class 6, division 1, as to which see p. 362, *ante*.

(*c*) See pp. 365, 372, *ante*.

(*d*) An explosive put in a building in contravention of this enactment is deemed to be kept in an unauthorised place, and the offender may be punished accordingly (Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 64); see p. 364, *ante*.

(*e*) See p. 370, *ante*.

(*f*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 64.

(*g*) *Ibid.* The reconstruction of a building in contravention of this section is a breach of the terms of a licence and is punishable accordingly; see note (*e*), p. 368, *ante*.

(*h*) See p. 398, *ante;* and see title CORONERS, Vol. VIII., pp. 245, 246.

(*i*) 38 & 39 Vict. c. 17. As to explosions in mines etc. generally, see Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), ss. 11, 22; Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), ss. 35, 48; Notice of Accidents Act, 1906 (6 Edw. 7, c. 53); and generally, title MINES, MINERALS AND QUARRIES. In cases of fatal accidents by explosions in mines and quarries, the Secretary of State has given a general appointment to H.M. Inspectors of Mines to watch the proceedings on his behalf. If one of them is present, the inquest need not be adjourned unless he makes a special request to that effect.

(*j*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 65. Coroners have been instructed that this is not to be held to include deaths resulting from the discharge of firearms (Home Office Circular, 5th February, 1879). Accidents relating to factory explosions under Government control are exempt from these

SECT. 2. Inquiries and Investigations.

SECT. 3.—*Inquiries and Investigations.*

Inquiries.

920. Where an accident has been caused by explosion or fire either in connection with an explosive or of which notice is required to be given (*k*), the Secretary of State may direct an inquiry to be made by a Government inspector into the cause thereof (*l*).

Investigations.

Where it appears to the Secretary of State, either before or after the commencement of any such inquiry, that a more formal investigation is expedient, he may direct such investigation to be held. In such a case he may either appoint some person or persons having legal or special knowledge to assist the Government inspector in holding the formal investigation, or he may direct the county court judge (*m*), stipendiary magistrate, metropolitan police magistrate, or other person or persons named in the Order to hold the inquiry with the assistance of a Government inspector or other assessor or assessors named in the Order. Such investigation must be held in open court, in such manner as the persons holding the investigation and constituting the court may think most effectual. The court has the powers of a court of summary jurisdiction when hearing an information for offences against the Act (*n*), and all the powers of a Government inspector, and certain general powers, including the right of entry and inspection of any place or building which appears necessary for the purpose of proper investigation, the summoning and examination of witnesses, the production of books, papers, and documents, the administration of oaths, and the signing by witnesses of declarations of the truth of statements made by them (*o*).

Part VII.—Outrages.

Outrages.

921. The Explosive Substances Act, 1883 (*p*), was passed for the prevention of outrages by means of explosives likely to cause injury to life and property (*q*).

provisions (Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 97; and see p. 363, *ante*). For coroners generally, see title CORONERS, Vol. VIII., pp. 210 *et seq.*

(*k*) See p. 398, *ante.*

(*l*) Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 66.

(*m*) See title COUNTY COURTS, Vol. VIII., p. 622.

(*n* Explosives Act, 1875 (38 & 39 Vict. c. 17); and see p. 395, *ante.*

(*o*) *Ibid.*, s. 66. Expenses incurred in connection with an inquiry or investigation form part of the expenses of the Secretary of State in carrying the Act into execution. Provision is also made for the allowance of the expenses of witnesses attending before a court of investigation, and for the infliction of penalties for non-compliance with summonses or requisitions or for impeding the court in carrying out its duty (*ibid.*, s. 66 (5), (6)). A report of the inquiry must be made to the Secretary of State, who is required to publish it (*ibid.*, s. 66 (4)). As to evidence of witnesses, in general, see title EVIDENCE, Vol. XIII., pp. 569 *et seq.*

(*p*) 46 & 47 Vict. c. 3.

(*q*) *Ibid.*, s. 2. See also Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100), ss. 28, 29, 30, 64; and Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), ss. 9, 10, 45, 54; and for the offences created and dealt with by the Act, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 775—777. By s. 8 of

Inquiry.

922. The Attorney-General may, where he has reasonable ground to believe that a crime under the Explosive Substances Act, 1883 (*r*), has been committed, order an inquiry to be held, and with that object may authorise any justice for the place in which the crime is suspected to have been committed to hold the inquiry.

With such authority a justice may, although no person is charged before him, sit at a police court or station or petty sessional or occasional court-house and examine witnesses on oath concerning such crime, take depositions, and bind over witnesses to appear at the next petty sessions, or when called upon within three months (*s*).

A witness on such examination is not excused from answering any question on the ground that the answer may incriminate or tend to incriminate himself, but any answer he may give is not admissible against him in any proceeding, civil or criminal, except on indictment or other criminal proceeding for perjury (*s*).

The justice who so examines a person concerning any crime must not take part in committing him for trial for such crime (*s*).

Absconding witness.

When a witness is bound over to appear as aforesaid and information is laid in writing and on oath that he is about to abscond or has absconded, a justice may issue a warrant for his arrest, and, if he is arrested, any justice, upon being satisfied that the ends of justice would otherwise be defeated, may commit him to prison until the time at which he is bound to give evidence, unless he in the meantime produces sufficient sureties. Such person so arrested is entitled on demand to receive a copy of the information upon which the warrant for his arrest was issued (*s*).

Proceedings.

923. If a person is charged before a justice with any crime under the Explosive Substances Act, 1883 (*r*), no further proceeding shall be taken against him without the consent of the Attorney-General, except such as the justice may think necessary by remand or otherwise to secure the safe custody of such person (*t*).

the Explosive Substances Act, 1883 (46 & 47 Vict. c. 3), the Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 73, 74, 75, 89, 96, relating to the search for, and seizure, detention, and forfeiture of explosives and the disposal of seized or forfeited explosives are made to apply in like manner as if a crime or forfeiture under the Explosive Substances Act, 1883 (46 & 47 Vict. c. 3), were an offence or forfeiture under the Explosives Act, 1875 (38 & 39 Vict. c. 17). A master or owner of a vessel is also given certain powers of search by the same section. For the issue of a warrant for search for explosives under the Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 65, or under the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 55, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 310; see also pp. 390, 397, *ante*.

(*r*) 46 & 47 Vict. c. 3.

(*s*) *Ibid.*, s. 6. In regard to the attendance etc. of witnesses the justice has the same powers as if the matter was one on information or complaint, as to which see, generally, title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 314. As to these various courts, see also title MAGISTRATES.

(*t*) *Ibid.*, s. 7; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 293. The section also contains a provision as to the form of indictment and as to a person not being exempted from indictments and other proceedings at common law or under other Acts. When the case is not serious, proceedings may be taken under the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), ss. 9, 10, or under the Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100), ss. 12, 28—30.

PART VII. Outrages.

For all purposes of and incidental to arrest, trial, and punishment, a crime for which a person is liable to be punished under the said Act when committed out of the United Kingdom is to be deemed to have been committed in the place in which the person is apprehended or is in custody (*u*).

(*u*) Explosive Substances Act, 1883 (46 & 47 Vict. c. 3), s. 7 (3).

EXTENT.

See CROWN PRACTICE; EXECUTION; PRACTICE AND PROCEDURE.

EXTORTION.

See CRIMINAL LAW AND PROCEDURE.

EXTRADITION AND FUGITIVE OFFENDERS.

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Part I.—Extradition.

SECT. 1.—*Definition and Extent of Extradition.*

Definition.

924. Extradition is the delivery on the part of one Government to another of those who have fled from justice.

Statutes.

925. The law of England with regard to extradition depends entirely upon statute. There is no doubt of the right of the executive power to remove from the country upon such grounds as may seem to it sufficient any persons who are the subjects of another State. This right is exercised in Great Britain and the British possessions (*a*), to which by Order in Council the Acts have been applied, by proceedings which are authorised and regulated by statute (*b*).

Orders in Council.

926. No Order in Council applying the Acts in the case of any foreign State may be made unless the arrangement is determinable by either party to it after the expiration of a notice not exceeding one year, and is in conformity with the provisions of the Acts, and in particular with the restrictions on the surrender of fugitive criminals which are contained in the Acts (*c*). An Order in Council may be revoked or altered by another Order, and all the provisions of the Acts with respect to the original Order shall (so far as applicable) apply, *mutatis mutandis*, to any such new Order (*d*).

Treaties.

927. Extradition treaties are now in force between this country and the following States:—Argentine Republic, 22nd May, 1889, Austria-Hungary, 3rd December, 1873, 26th June, 1901; Belgium, 29th October, 1901, 5th March, 1907; Bolivia, 22nd February, 1892; Brazil, 13th November, 1872; Chile, 26th January, 1897; China, 26th June, 1858, 1st March, 1894 (*e*); Colombia, 27th October, 1888; Cuba, 3rd October, 1904; Denmark, 31st March, 1873; Ecuador, 20th September, 1880; France, 14th August, 1876 (*f*), 13th February, 1896; France (Tunis), 31st December, 1889; Germany, 14th May, 1872 (*g*); Germany (dependencies), 5th May,

(*a*) "British possession" means any colony, plantation, island, territory, or settlement within His Majesty's dominions, and not within the United Kingdom, the Channel Islands, or the Isle of Man. Canada is the only British possession to which the Acts are not applied. The operation of the Acts there is suspended by Orders in Council of 17th November, 1888, and 6th July, 1907. Proceedings there are regulated by Canadian statutes (40 Vict. c. 25, s. 24, and 52 Vict. c. 36).

(*b*) Extradition Act, 1870 (33 & 34 Vict. c. 52); Extradition Act, 1873 (36 & 37 Vict. c. 60); Extradition Act, 1895 (58 & 59 Vict. c. 33); Extradition Act, 1906 (6 Edw. 7, c. 15); and see also title ALIENS, Vol. I., p. 323.

(*c*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 4.

(*d*) *Ibid.*, s. 21. As to the contents of an Order in Council, see p. 407, *post*.

(*e*) To this treaty and Convention it seems that the Extradition Acts have not been applied by Order in Council; compare note (*y*), p. 420, *post*.

(*f*) This treaty was modified by a Convention signed 17th October, 1908.

(*g*) The word "discharged" in Art. IV. of this treaty does not mean temporarily

1894; Guatemala, 4th July, 1885; Hayti, 7th December, 1874; Italy, 5th February, 1873; Italy (as to Malta), 7th May, 1873; Liberia, 16th December, 1892; Luxemburg, 24th November, 1880; Mexico, 7th September, 1886; Monaco, 17th December, 1891; Netherlands, 26th September, 1898 (*h*); Nicaragua, 19th April, 1905; Norway, 26th June, 1873, renewed by agreement of 18th February, 1907; Panama, 25th August, 1906; Peru, 26th January, 1904; Portugal, 17th October, 1892; Portugal (protocol), 30th November, 1892; Roumania, 9th (21st) March, 1893; Roumania (protocol), 9th (21st) March, 1893, 1st (13th) March, 1894; Russia, 24th November, 1886; Salvador, 23rd June, 1881; San Marino, 16th October, 1899; Servia, 23rd November (6th December), 1900; Siam, 3rd September, 1883, 30th November, 1885 (*i*); Spain, 4th June, 1878, 19th February, 1889; Sweden, 26th June, 1873, renewed by agreement of 2nd July, 1907; Switzerland, 26th November, 1880, 29th June, 1904; Tonga, 29th November, 1879; United States of America, 9th August, 1842, 12th July, 1889 (*j*), 13th December, 1900, 12th April, 1905; Uruguay, 26th March, 1884; 20th March, 1891.

SECT. 2.—*Persons and Offences to which the Statutory Provisions and Treaties apply.*

SUB-SECT. 1.—*Persons.*

928. The statutory provisions apply to fugitive criminals (*k*), defined (*l*) as all persons (*m*), accused or convicted (*n*) of an

Who may be surrendered.

discharged; and a person so temporarily discharged and liable to be called upon to complete a sentence is not a person who has "acquired exemption from punishment by lapse of time" under Art. V., although at the time when he is so called upon his sentence, if served continuously, would have expired (*R.* v. *Brixton Prison* (*Governor*), *Ex parte Calberla*, [1907] 2 K. B. 861).

(*h*) Art. IV. of this treaty means that if a crime has been committed by a person, for which crime he could be punished in both countries and he had in fact been punished for it in one, he could not be tried again for it in the other. The words in Art. V. "acquired by lapse of time according to the laws of the State applied to" refer to such limitations as are imposed by various statutes: (*R.* v. *Holloway Prison* (*Governor*), *Ex parte Buddenborg* (1898), 14 T. L. R. 252, *per* WRIGHT, J., at p. 253.) Where execution of a sentence is postponed a prisoner cannot claim that the period of postponement should be regarded as a period of sentence served (*ibid.*).

(*i*) To this treaty and Supplementary Article it seems that the Extradition Acts have not been applied by Order in Council; compare note (*y*), p. 420, *post.*

(*j*) In view of Art. VIII. of this treaty there must be evidence that the offence charged was committed after the coming into force thereof (*R.* v. *Ashforth* (1892), 8 T. L. R. 283).

(*k*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 6.

(*l*) *Ibid.*, s. 26. In *R.* v. *Nillins* (1884), 53 L. J. (M. C.) 157, it was decided that a person residing in England and procuring goods from traders in Germany by false pretences contained in letters written and posted in England, the goods being delivered to his order, some at places in Germany and some in England, and forged bills of exchange being sent by post from England to Germany in payment for such goods, was a "fugitive criminal" within the meaning of the Act and liable to be surrendered to Germany although he had never been in that country. See also *R.* v. *Jacobi and Hiller* (1881), 46 L. T. 595, n.

(*m*) A subject of a foreign State found within the jurisdiction of the State on which the demand for surrender is made is liable to extradition (*R.* v. *Ganz* (1882), 9 Q. B. D. 93; see *R.* v. *Carr* (1882), 10 Q. B. D. 76, *per* Lord COLERIDGE, C.J., at p. 85).

(*n*) The term "convicted" does not include nor refer to a conviction which

SECT. 2. Persons and Offences etc.

extradition crime (*o*) committed within the jurisdiction of any foreign State (*p*), who are in, or are suspected of being in, some part of His Majesty's dominions, whether the crime in respect of which the surrender is sought was committed before or after the date of the Order in Council applying the Extradition Act, and whether there is or is not any concurrent jurisdiction in any court of His Majesty's dominions over that crime (*q*).

Accessories.

929. Accessories before or after the fact to any extradition crime are liable to be apprehended and surrendered in the same manner as principal offenders (*r*).

Qualification to general rule.

930. The generality of these provisions is, however, qualified in many cases by terms in the treaties providing that the contracting States shall not be bound to deliver up their own subjects (*s*).

SUB-SECT. 2.—*Offences.*

Definition of an extradition crime.

931. An extradition crime is a crime which, if committed in England or within English jurisdiction, would be one of the crimes enumerated in the Extradition Acts (*t*) and is included

under foreign law is a conviction for contumacy, but the term "accused person" includes a person so convicted (Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 26).

(*o*) For the definition of an extradition crime, see note (*t*), *infra*.

(*p*) Every colony, dependency, and constituent part of a foreign State, and every vessel of that State, is (except where expressly mentioned as distinct in the Act) deemed to be within the jurisdiction of, and to be part of, such foreign State (Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 25).

(*q*) *Ibid.*, s. 6.

(*r*) Extradition Act, 1873 (36 & 37 Vict. c. 60), s. 3.

(*s*) In two treaties only do both contracting parties engage to surrender fugitive criminals without excepting their own subjects, namely, those with Ecuador and the United States of America.

In the treaties with the following countries the contracting parties except their own subjects from surrender, namely, Brazil, Denmark, Germany, Guatemala, Hayti, Italy, Nicaragua, Norway, Portugal, Salvador, Sweden, and Uruguay. In the treaties with the following countries the contracting parties reserve absolute discretion as to granting or refusing the surrender of their own subjects:—Argentine Republic, Austria, Belgium, Bolivia, Chile, Colombia, Cuba, France, Liberia, Mexico, Monaco, Netherlands, Panama, Peru, Roumania, Russia, San Marino, and Servia. In the United Kingdom this discretion rests with the Secretary of State (*Re Galwey*, [1896] 1 Q. B. 230). In the treaties with Luxemburg, Spain, and Switzerland the subjects of those States are excepted, but Great Britain makes no exception in respect of British subjects.

(*t*) The Extradition Act, 1870 (33 & 34 Vict. c. 52), Sched. I., contains the following list of crimes:—Murder and attempt and conspiracy to murder; manslaughter; counterfeiting and altering money and uttering counterfeit or altered money; forgery; counterfeiting and altering and uttering what is forged or counterfeited or altered; embezzlement and larceny; obtaining money or goods by false pretences; crimes by bankrupts against bankruptcy law; fraud by a bailee, banker, agent, factor, trustee, or director or member or public officer of any company made criminal by any Act for the time being in force; rape; abduction; child stealing; burglary and housebreaking; arson; robbery with violence; threats by letter or otherwise with intent to extort; piracy by the law of nations; sinking or destroying a vessel at sea, or attempting or conspiring to do so; assaults on board a ship on the high seas with intent to destroy life or to do grievous bodily harm; revolt or conspiracy to revolt by

in the treaty under which the application for surrender is made (*u*).

How construed.

932. These crimes are to be construed according to the law existing in England or in a British possession (as the case may be) at the date of the alleged crime (*v*).

Extradition Acts, how far applicable.

933. All the crimes enumerated in the Extradition Acts are not, however, to be found in every treaty, and the Acts are only applicable so far as they can be applied consistently with the terms and conditions contained in the treaty. The Order in Council applying the Acts must be co-extensive with and limited by the terms of the treaty in each case (*w*).

Offences included in all the treaties.

934. The following offences are included in all the treaties:— (i.) Murder (*x*); (ii.) attempt to murder; (iii.) manslaughter; (iv.) rape; (v.) arson; (vi.) abduction; (vii.) child stealing; (viii.) robbery with violence; (ix.) forgery and uttering what is forged; (x.) counterfeiting money and uttering counterfeit money; (xi.) larceny and embezzlement; (xii.) obtaining money or goods by false pretences; (xiii.) fraud by a bailee, banker, agent, factor, trustee, director, member, or public officer of any company; (xiv.) burglary and housebreaking (*y*); (xv.) crimes by bankrupts against bankruptcy law. Crimes committed at sea, including piracy (*z*), the sinking or destroying a vessel at sea or attempting so to do, revolt by two or more persons against the authority of the

two or more persons on board a ship on the high seas against the authority of the master.

To this list the following were added by the Extradition Act, 1873 (36 & 37 Vict. c. 60), s. 8, and schedule:—Kidnapping and false imprisonment; perjury and subornation of perjury, whether under common or statute law; any indictable offence under the Larceny Act, 1861 (24 & 25 Vict. c. 96), or any Act amending or substituted for the same not already included in this list; any indictable offence under the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), or any Act amending or substituted for the same not already included in this list; any indictable offence under the Forgery Act, 1861 (24 & 25 Vict. c. 98), or any Act amending or substituted for the same not already included in this list; any indictable offence under the Coinage Offences Act, 1861 (24 & 25 Vict. c. 99), or any Act amending or substituted for the same not already included in this list; any indictable offence under the Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100), or any Act amending or substituted for the same not already included in this list; and any indictable offence under the laws for the time being in force in relation to bankruptcy not already included in this list.

By the Slave Trade Act, 1873 (36 & 37 Vict. c. 88), s. 27, offences against that Act or otherwise in connection with the slave trade are to be deemed to be inserted in this list.

Bribery has now been added to this list by the Extradition Act, 1906 (6 Edw. 7, c. 15). As to treason, see title CONSTITUTIONAL LAW, Vol. VI., p. 346.

(*u*) *Re Windsor* (1865), 6 B. & S. 522.

(*v*) *R.* v. *Dix* (1902), 18 T. L. R. 231.

(*w*) *R.* v. *Wilson* (1877), 3 Q. B. D. 42.

(*x*) Portugal, however, will not give up a person accused or guilty of any crime punishable with death, and Peru may refuse to do so.

(*y*) Except Brazil.

(*z*) Piracy by a Chinaman on board a French ship does not justify the rendition of the culprit to China (*A.-G. for Hong Kong* v. *Kwok-a-Sing* (1873), L. R. 5 P. C. 179).

SECT. 2. Persons and Offences etc.

master of the ship, and assault on board a ship on the high seas with intent to do grievous bodily harm are in substance included in all treaties except those with Luxemburg and Switzerland.

Minor offences.

With regard to the other and minor offences mentioned in the Acts the differences between the respective treaties are so numerous and so minute that in practice it is necessary in every case to consult the text of the treaty in both (*a*) the languages in which it is drawn up.

SECT. 3.—*Procedure on the Extradition of Offenders from the United Kingdom.*

SUB-SECT. 1.—*Requisition for Surrender.*

Requisition for surrender.

935. When a treaty has been made with a foreign State and the Extradition Acts have been applied by Order in Council, one of His Majesty's principal Secretaries of State (*b*) may, upon a requisition made to him by some person recognised by him as a diplomatic representative of that foreign State (*c*), by order under his hand and seal, signify to the chief magistrate of the metropolitan police courts or to one of the other magistrates of the metropolitan police court in Bow Street that such requisition has been made and require him to issue his warrant for the apprehension of the fugitive criminal (*d*). If the Secretary of State is of opinion that the offence is one of a political character he may, if he think fit, refuse to send any such order, and he may also at any time order a fugitive criminal accused or convicted of such offence to be discharged from custody (*e*).

Where the crime in respect of which the surrender of a fugitive criminal is sought was committed on board any vessel on the high seas which comes into any port of the United Kingdom the order may be addressed to any stipendiary magistrate in England or Ireland or to any sheriff or sheriff-substitute in Scotland (*f*).

SUB-SECT. 2.—*Warrant of Arrest.*

Issue of warrant on order of Secretary of State.

936. A warrant may be issued by a police magistrate on receipt of the order of the Secretary of State, and upon such evidence (*g*)

(*a*) *Re Arton* (No. 2), [1896] 1 Q. B. 509; *Ex parte Kohn* (1900), 35 L. J. 173; *R.* v. *Dix* (1902), 18 T. L. R. 231.

(*b*) As to Secretaries of State, see title CONSTITUTIONAL LAW, Vol. VII., pp. 65, 69, 84.

(*c*) Including any person recognised by the Secretary of State as a consul-general of that State (Extradition Act, 1873 (36 & 37 Vict. c. 60), s. 7). No form of requisition is used. The application is usually made by letter requesting the surrender of the offender.

(*d*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 7; see form of order, *ibid.*, Sched. II.; see also title CONSTITUTIONAL LAW, Vol. VII., pp. 69 and 84.

(*e*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 7; *Re Arton*, [1896] 1 Q. B. 108. For further grounds for discharge after committal, see p. 417, *post*.

(*f*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 16. The jurisdiction thus conferred on a stipendiary magistrate and a sheriff or sheriff-substitute is in addition to and not in derogation or exclusion of the jurisdiction of the police magistrate (Extradition Act, 1873 (36 & 37 Vict. c. 60), s. 6).

(*g*) "There must be some evidence, but very little will do" (*per* JESSEL, M.R., in *R.* v. *Weil* (1882), 9 Q. B. D. 701, 706, C. A.).

as would in his opinion justify the issue of the warrant if the crime had been committed or the criminal convicted in England (*h*).

Issue of warrant without an order of Secretary of State.

937. A warrant may also be issued by a police magistrate or any justice of the peace in any part of the United Kingdom, without the order of the Secretary of State, upon such information or complaint and such evidence as would in the opinion of the person issuing the warrant justify the issue of a warrant if the crime had been committed or the criminal convicted in that part of the United Kingdom in which he exercises jurisdiction (*i*). Any person, however, issuing a warrant without such an order must send a report of the fact of such issue, with the materials upon which he acted or copies thereof, to the Secretary of State, who may, if he think fit, order the warrant to be cancelled and the person mentioned in it to be discharged if already apprehended (*k*).

Execution of warrant.

938. The warrant of a police magistrate issued in pursuance of the Extradition Acts may be executed in any part of the United Kingdom without the indorsement of a local magistrate (*l*).

Form of warrant.

939. The warrant should be in the form prescribed (*m*). It need not describe the offence with great strictness, but the charge may be mentioned in general terms (*n*).

Proceedings after apprehension.

940. A fugitive criminal apprehended (*o*) on a warrant issued without the order of a Secretary of State is brought before some person having power to issue such a warrant, who orders him to be brought before a police magistrate. Such police magistrate discharges the prisoner unless, within some reasonable time fixed by himself, he receives from the Secretary of State an order signifying that a requisition has been made for the criminal's surrender (*p*).

Arrest on suspicion.

941. A fugitive criminal who upon reasonable grounds is suspected of having done that which, if done in this country, would amount to felony may, it seems, be arrested without a warrant (*q*).

SUB-SECT. 3.—*Trial.*

Trial before magistrate.

942. The fugitive criminal having been arrested is brought before one of the police magistrates of the metropolitan police court in Bow Street (*r*), except in cases where the crime alleged was committed on board any vessel on the high seas which comes into any port of the United Kingdom, and in such a case the fugitive criminal may be brought before any stipendiary magistrate in England or Ireland or any sheriff or sheriff-substitute in Scotland (*s*).

(*h*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 8 (1).
(*i*) *Ibid.*, s. 8 (2).
(*k*) *Ibid.*, s. 8.
(*l*) *Ibid.*, s. 13.
(*m*) See *ibid.*, Sched. II.
(*n*) *Ex parte Terraz* (1878), 4 Ex. D. 63; *Ex parte Piot* (1883), 48 L. T. 120.
(*o*) Apprehension includes "detention" of a person already in custody (*R.* v *Weil* (1882), 9 Q. B. D. 701).
(*p*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 8.
(*q*) *R.* v. *Weil* (1882), 9 Q. B. D. 701, C. A., *per* BRETT, L.J., at p. 706.
(*r*) Extradition Act, 1870 (33 & 34 Vict. c. 52), ss. 8, 26.
(*s*) *Ibid.*, s. 16 (1).

SECT. 3. **Procedure on Extradition.**

Upon representation made by or on behalf of the criminal, the Secretary of State may, if he is of opinion that removal to Bow Street would be dangerous to the life or prejudicial to the health of the criminal, order the case to be heard at the place in the United Kingdom at which the criminal was apprehended or for the time being is (*t*). He may further direct that the case shall be heard by any metropolitan police magistrate or stipendiary magistrate if the place is in England, or by a sheriff or sheriff-substitute if it is in Scotland, or by any stipendiary magistrate if it is in Ireland, and such magistrate is deemed to be a police magistrate within the meaning of the Extradition Act, 1870, and has the same jurisdiction, duties, and powers, as near as may be, and may commit to the same prison, as if he were a magistrate for the county, borough, or place in which the hearing takes place (*a*).

Magistrate's jurisdiction.

943. The police magistrate hears the case in the same manner and has the same jurisdiction and powers, as near as may be, as if the prisoner were before him charged with an indictable offence committed in England (*b*).

Remand.

944. The magistrate has power to adjourn the hearing and remand (*c*) the prisoner in custody or on bail (*d*).

Surrender after committal.

945. A fugitive criminal cannot be surrendered for fifteen days after the date of committal (*e*), and if the magistrate decides to commit the prisoner for extradition he must inform him at the hearing that he will not be surrendered until after the expiration of fifteen days and that he has a right to apply for a writ of *habeas corpus* (*f*).

SUB-SECT. 4.—*Evidence.*

(i.) *What Evidence is required.*

Copy of Order in Council.

946. A copy of the Order in Council (*g*) applying the Extradition Acts in the case of the foreign State making the requisition for surrender must be produced before the police magistrate, since its

(*t*) Extradition Act, 1895 (58 & 59 Vict. c. 33), s. 1 (1).

(*a*) *Ibid.*, s. 1 (2).

(*b*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 9. These duties and powers are regulated and defined by the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), amended in some particulars by the Criminal Law Amendment Act, 1867 (30 & 31 Vict. c. 35).

(*c*) In the treaty with Germany this power is by Art. XII. limited to two months, but, where sufficient evidence for extradition upon one charge is given within the two months, the magistrate may proceed even after that time to consider other charges against the prisoner and commit him upon all of them (*Re Bluhm*, [1901] 1 K. B. 764). Where a prisoner is brought before a competent tribunal and is charged with an extradition offence and remanded for further evidence to be brought forward by the prosecution, a judge cannot upon a writ of *habeas corpus* treat the remand warrant as a nullity and proceed to adjudicate upon the case as though the whole evidence were before him (*United States of America* v. *Gaynor*, [1905] A. C. 128, P. C.).

(*d*) See p. 414, *post*.

(*e*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 3 (4).

(*f*) *Ibid.*, s. 11; see title CROWN PRACTICE, Vol. X., p. 51. As to surrender generally see p. 416, *post*.

(*g*) *Ibid.*, s. 5.

operation may be limited by conditions, exceptions, and qualifications contained in the Order itself (*h*). This Order must recite or embody the terms (*i*) of the arrangement made with the foreign state, and must have been published in the *London Gazette* and laid before both Houses of Parliament (*k*).

Order of Secretary of State.

947. The order of the Secretary of State signifying that requisition has been made for the surrender of the person accused must be produced to the police magistrate (*l*).

Foreign warrant.

948. The foreign warrant (*m*) authorising the arrest of the criminal must be produced (*n*).

This warrant may be any judicial document authorising the arrest of a person accused or convicted of crime (*o*). A copy of the foreign warrant of arrest will suffice (*p*). It must be duly authenticated (*q*) by what purports to be the signature of a judge, magistrate, or officer of the foreign State where it was issued.

Previous conviction.

949. Where the fugitive criminal has already been convicted (*r*) by the foreign tribunal of the offence in respect of which his extradition is sought, a certificate of, or judicial document stating the fact of, such conviction, and purporting to be certified by a judge, magistrate, or officer of the foreign State where the conviction took place, must be produced to the magistrate and be authenticated by the oath of some witness or by the official seal of the Minister of Justice or some other Minister of State (*a*).

(*h*) The Order in Council must be co-extensive with and limited by the treaty, and the Act of Parliament is only applicable so far as it can be applied consistently with the terms and conditions contained in the treaty (*R.* v. *Wilson* (1877), 3 Q. B. D. 42).

(*i*) The magistrate must be satisfied that the offence disclosed by the evidence is included within the terms of the treaty and the schedule of the Extradition Acts, and is therefore an extradition crime (Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 9), and an offence for which extradition can be granted (*Re Arton*, [1896] 1 Q. B. 108). The terms of the treaty require careful examination. The English and foreign versions are not always translations of each other. They are different versions of the agreement which describe the acts in the terms used in the respective countries. When the acts alleged are criminal according to the law of each party to the agreement and fall within the terms of the English version of the treaty, the accused must be surrendered by whatever term the offence may be described in the foreign law (*Re Arton* (No. 2), [1896] 1 Q. B. 509; *Ex parte Kohn* (1900), 35 L. J. 173; *R.* v. *Dix* (1902), 18 T. L. R. 231).

(*k*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 2.

(*l*) *Ibid.*, s. 8. The practice is for the order to be sent by the Home Office to the police magistrate.

(*m*) This warrant need not specify the crime in the exact words defining the offence in English law (*R.* v. *Jacobi and Hiller* (1881), 46 L. T. 595, n.; *Re Bellencontre*, [1891] 2 Q. B. 122). It is not the warrant that is to be looked to for ascertaining what the offence or crime is for which the accused is to be detained, but the facts in the depositions (*Ex parte Piot* (1883), 48 L. T. 120).

(*n*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 10.

(*o*) *Ibid.*, s. 26.

(*p*) *R.* v. *Ganz* (1882), 9 Q. B. D. 93.

(*q*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 15.

(*r*) This does not include a conviction which under foreign law is a conviction for contumacy (*ibid.*, s. 26).

(*a*) *Ibid.*, s. 15 (3).

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950. The identity of the person who has been arrested with the person accused (*b*) must be established by evidence which the magistrate can accept.

Primâ facie proof of guilt.

951. There must be *primâ facie* proof of the guilt of the accused given before the magistrate according to the English rules of evidence, and he can only act upon evidence given before himself (*c*). This evidence may be partly in the form of depositions or statements on oath or affirmation (*d*) taken in a foreign State, or copies thereof, and foreign certificates of, or judicial documents stating the fact of, conviction may, if duly authenticated, be received in evidence (*e*). If such evidence is produced as would, according to English law, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the magistrate is bound to commit him to prison (*f*). There must be some evidence that the prisoner committed the extradition crime within the jurisdiction of the country seeking extradition to justify the magistrate in committing the prisoner (*g*).

(ii.) *What Evidence is admissible.*

Evidence of accused.

952. The accused person may himself give evidence in opposition to the demand for extradition, as it is a criminal proceeding (*h*).

It is the duty of the magistrate to hear evidence tendered on behalf of the defendant (*i*).

Evidence that offence is of a political character.

953. The accused person is entitled to call evidence before the magistrate that the offence for which his extradition is demanded is one of a political character (*k*), or he may prove to the satisfaction of the police magistrate or the court or Secretary of State, that the

(*b*) Including a person convicted under foreign law for contumacy (Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 26); and see *R.* v. *Brixton Prison* (*Governor*), *Ex parte Van der Auwera* [1907] 2 K. B. 157).

(*c*) *Re Guerin* (1888), 58 L. J. (M. C.) 42; and see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 377 *et seq.*; EVIDENCE, Vol. XIII., pp. 436 *et seq.*

(*d*) Extradition Act, 1873 (36 & 37 Vict. c. 60), s. 4. These depositions ought to be most strictly scrutinised, but there is no duty on the magistrate to consider whether they were taken in accordance with English rules of evidence (*R.* v. *Zossenheim* (1903), 20 T. L. R. 121).

(*e*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 14. These depositions need not have been taken in the presence of the accused, nor upon the particular charge for which his extradition is sought (*Re Counhaye* (1873), L. R. 8 Q. B. 410).

(*f*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 10.

(*g*) *R.* v. *Lavaudier* (1881), 15 Cox, C. C. 329; *R.* v. *Holloway Prison* (*Governor*) (1902), 18 T. L. R. 475.

(*h*) Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 1; *R.* v. *Kams* (1900), *Times*, 30th April. See also title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 317 *et seq.*

(*i*) *R.* v. *Zossenheim*, *supra.*

(*k*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 9. This expression is to be interpreted as meaning that fugitive criminals are not to be surrendered for extradition crimes if those crimes were incidental to or formed part of political disturbances (*Re Castioni*, [1891] 1 Q. B. 149). The decision of the magistrate upon this point is not binding upon the court either in law or fact (*ibid.*; see also *Re Siletti*, *R.* v. *Holloway Prison* (*Governor*) (1902), 71 L. J. (K. B.) 935). Crimes committed by anarchists are not regarded as political offences, as, in order to constitute an offence of a political character, there must be two or more parties in the State each seeking to impose the government of their own choice on the other, and the act done must be committed not for private or personal reasons, but in pursuance of that object (*Re Meunier*, [1894] 2 Q. B. 415).

requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character (*l*).

The accused person may show that there is no provision made by the law of the state demanding his extradition, or by arrangement therewith, such as is made by the law of England (*m*), that he shall not be detained or tried for an offence (*n*) committed before his surrender other than the extradition crime proved by the facts on which the requisition for surrender is grounded (*o*).

Evidence of nationality.

The accused person may call evidence of his nationality when that question is material (*p*), and may call evidence to prove an *alibi*, and such evidence would certainly be received (*q*).

Witnesses.

The magistrate may impound goods in order that they may be produced at the trial abroad, but he cannot do so after he has committed the accused (*r*).

Impounding goods.

954. The magistrate must, if required so to do by a Secretary of State, for the purposes of any criminal matter pending in any court or tribunal of any foreign State, take the evidence of every witness appearing before him for the purpose in like manner as if such witness appeared on a charge against some defendant for an indictable offence (*s*). The evidence may be taken in the presence or absence of the person charged. Witnesses may, after payment or tender of a reasonable sum for costs and expenses, be compelled to

(*l*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 3 (1). A plea that the demand is not made in good faith or in the interests of justice can only be addressed to the Secretary of State, for the court will not permit argument on the point that a friendly State is not acting in good faith in making its application for surrender; that is not a question which the judicial authorities of this country have any power to entertain (*Re Arton*, [1896] 1 Q. B. 108, *per* Lord RUSSELL OF KILLOWEN, C.J., at p. 115).

(*m*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 19.

(*n*) Including all criminal offences, but not disobedience to an order of court in a civil action punishable by attachment (*Pooley* v. *Whetham* (1880), 15 Ch. D. 435, C. A.; see also title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., p. 324).

(*o*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 3 (2). In all cases except those of China and Siam the provision here referred to is found in the treaty; and see *Re Bouvier* (1872), 42 L. J. (Q. B.) 17. Where a fugitive criminal is charged with two offences, one of which is not an extradition crime, the magistrate must make it clear that the crime in respect of which the prisoner is committed for extradition is that which is an extradition crime (*R.* v. *Dix* (1902), 18 T. L. R. 231).

(*p*) *Re Guerin* (1888), 58 L. J. (M. C.) 42. In this case the magistrate's decision upon the question of the nationality of the prisoner was questioned, and the court, being unable to decide upon the matter of fact, directed an issue to be tried before a judge and jury which terminated in a finding that the prisoner was not an English subject, and he was consequently surrendered. Arriving in France he was condemned to penal servitude for life and transported to the French penal settlement, known as Devil's Island, in French Guiana. From this place he escaped to England, whence his extradition was again demanded in 1907. He set up a similar plea, namely, that he was a British subject and therefore not liable to be surrendered, and on this occasion he did so successfully, and his surrender was refused (*R.* v. *Brixton Prison* (*Governor*), *Ex parte Guerin* (1907), *Times*, 15th June).

(*q*) *R.* v. *Allen and Taylor* (1888), cited in Clarke on Extradition, 4th ed., p. 252.

(*r*) *R.* v. *Lushington, Ex parte Otto*, [1894] 1 Q. B. 420; *Re Borovski and Weinbaum, Ex parte Salaman*, [1902] 2 K. B. 312.

(*s*) As to the manner of taking such evidence, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 246, 311 *et seq.*

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attend and give evidence, and answer questions and produce documents (*t*) in like manner as in the case of a charge preferred for an indictable offence (*u*).

Obtaining testimony of witness.

955. The testimony of any witness may be obtained in relation to any criminal matter pending in any court or tribunal in a foreign state in like manner as it may be obtained in relation to any civil matter under the Foreign Tribunals Evidence Act, 1856 (*v*), and the provisions of that Act may be construed as if the term "civil matter" included a criminal matter, and the term "cause" included a proceeding against a criminal (*w*).

SUB-SECT. 5.—*Bail.*

Bail.

956. The magistrate before whom a fugitive criminal is brought may admit him to bail pending the inquiry (*a*). After a committal for the purpose of surrender the King's Bench Division or, in vacation, any judge thereof may admit to bail, but the statutory right of a person committed for trial for misdemeanour to be released on bail (*b*) does not extend to persons committed with a view to their surrender under an extradition treaty (*c*).

The granting of bail is discretionary, and a prisoner charged with an extradition crime is in the same position as a defendant under remand on a charge of misdemeanour in that he has no right to bail under the Indictable Offences Act, 1848 (*d*), while under remand (*e*).

SUB-SECT. 6.—*Committal or Discharge.*

Magistrate's discretion.

957. The magistrate, exercising his discretion, must either commit the prisoner to prison to await extradition or discharge him (*f*).

Committal to prison.

958. If he commits such criminal to prison, he must commit him (*g*) to the Middlesex House of Detention (*h*) or to some other

(*t*) *R.* v. *Daye*, [1908] 2 K. B. 333.

(*u*) Extradition Act, 1873 (36 & 37 Vict. c. 60), s. 5.

(*v*) 19 & 20 Vict. c. 113; see title EVIDENCE, Vol. XIII., pp. 630 *et seq.*

(*w*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 24. This section does not apply in the case of any criminal matter of a political character.

(*a*) "This inherent power to admit to bail is historical, and has long been exercised by the court, and if the legislature had meant to curtail or circumscribe this well-known power, their intention would have been carried out by express enactment" (*R.* v. *Spilsbury*, [1898] 2 Q. B. 615, *per* Lord RUSSELL OF KILLOWEN, C.J., at p. 622). This case arose under the Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), but it would seem that the principle is equally applicable to cases under the Extradition Acts.

(*b*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 323 *et seq.*

(*c*) "It is clear that the magistrate may remand the defendant pending the inquiry, and the inquiry may extend over a long period of time, and it is also clear that the magistrate may admit the defendant to bail as often as he remands him (*R.* v. *Spilsbury*, *supra*, *per* Lord RUSSELL OF KILLOWEN, C.J., at p. 621; see also *R.* v. *Pasquale de Francicis* (1895), *Times*, 14th March; *R.* v. *Kunau* (1908), *Times*, 18th November).

(*d*) 11 & 12 Vict. c. 42.

(*e*) *R.* v. *Spilsbury*, *supra*; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 319.

(*f*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 10.

(*g*) One committal is sufficient though there is more than one charge (*Re Meunier*, [1894] 2 Q. B. 415).

(*h*) Under the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 89 (3), the county of London and the county of Middlesex are deemed one county for

prison in Middlesex, there to await the warrant of the Secretary of State for his surrender, and must send to the Secretary of State a certificate of the committal and such report upon the case as he may think fit (*i*).

Warrant of committal.

959. The warrant of committal should describe the offence in the terms used in English law, and should state that the offence constitutes an offence named in the foreign version of the treaty (*j*), and the date of the commission of the offence should also appear (*k*).

Illness of prisoner.

960. When the prisoner is committed to prison, the committing magistrate, if of opinion that it will be dangerous to the life or prejudicial to the health of the prisoner to remove him to prison, may order him to be held in custody at the place in which he for the time being is, or at any other place named in the order to which the magistrate thinks he can be removed without danger to his life or prejudice to his health. In such a case the form of warrant may be varied accordingly (*l*).

SUB-SECT. 7.—*Application for Habeas Corpus.*

Application for *habeas corpus*.

961. An application for a writ of *habeas corpus* may be made by the prisoner to test the validity of his commitment in accordance with the procedure specified elsewhere (*m*).

962. Counsel for the Crown shows cause against the rule, then counsel is heard for the prisoner, counsel for the Crown having a right to reply.

Duty of the court.

963. The court hearing the application is not a court of appeal from the magistrate on questions of fact, but has only to see that he had such evidence before him as gave him authority and jurisdiction to commit (*n*).

Sufficiency of evidence.

964. The court will not review the decision of the magistrate if there was any evidence before him to justify commitment. The sufficiency of such evidence is a question entirely for the magistrate (*o*). It is only when there was no evidence before the magistrate that the court will interfere (*a*). Should evidence be

legal proceedings, and in practice Brixton Prison is substituted for the Middlesex House of Detention.

(*i*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 10. For the form of the warrant of committal, see Extradition Act, 1870 (33 & 34 Vict. c. 52), Sched. II.

(*j*) *Re Arton* (No. 2), [1896] 1 Q. B. 509; *Ex parte Kohn* (1900), 35 L. J. 173; *R.* v. *Dix* (1902), 18 T. L. R. 231.

(*k*) *R.* v. *Ashforth* (1892), 8 T. L. R. 283.

(*l*) Extradition Act, 1895 (58 & 59 Vict. c. 33), s. 1 (3).

(*m*) For the procedure, see R. S. C., Ord. 59, r. 1 (g); Crown Office Rules, 1906, rr. 216, 217, 218, 219, 265; *R.* v. *Ganz* (1882), 9 Q. B. D. 93, n. (1); *R.* v. *Portugal* (1885), 16 Q. B. D. 487; and title CROWN PRACTICE, Vol. X., pp. 50, 51, 55 *et seq.*

(*n*) *Re Arton* (No. 2), *supra*.

(*o*) *Ex parte Huguet* (1873), 29 L. T. 41; *Re Counhaye* (1873), L. R. 8 Q. B. 410; *R.* v. *Maurer* (1883), 10 Q. B. D. 513; *Re Meunier*, [1894] 2 Q. B. 415; *Re Arton*, [1896] 1 Q. B. 108; *Re Siletti*, *R.* v. *Holloway Prison* (*Governor*) (1902) 71 L. J. (K. B.) 935.

(*a*) *R.* v. *Maurer*, *supra*.

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forthcoming after the committal which raises a doubt as to the identity of the prisoner, the court will not consider such evidence, but will leave the matter to the decision of the Secretary of State (*b*). The court will review the evidence given before the magistrate as to the nationality of the accused when that is material, for that is a matter of fact which is essential to the existence of the magistrate's jurisdiction (*c*). The court will consider arguments that the crime charged is not within the scope of the Act or the treaty, or that the crime charged is an offence of a political character, or that there was no evidence before the magistrate upon which he could exercise his discretion whether he would commit or not (*d*).

Trial of issue.

965. Upon the argument of an order *nisi*, the court or judge may direct any issue or issues of fact in dispute to be referred to a master for his report thereon, or to be tried by a judge and jury or a judge without a jury in the same manner as other issues of fact are tried (*e*).

Appeal.

966. No appeal lies from the decision of the King's Bench Division upon an application for a writ of *habeas corpus* or upon the return to such writ (*f*), but an independent application may be made to the Lord Chancellor (*g*).

SUB-SECT. 8. - *Surrender.*

When prisoner may be surrendered.

967. A person committed to prison cannot be surrendered until after the expiration of fifteen days, nor, if a writ of *habeas corpus* is issued, until the decision of the court has been given. The Secretary of State may extend such period (*h*).

Warrant of Secretary of State.

968. The Secretary of State, by warrant (*i*) under his hand and seal, orders the fugitive criminal to be surrendered to such person as may in his opinion be duly authorised to receive the fugitive criminal by the foreign State from which the requisition for the surrender proceeded, and such fugitive criminal is surrendered accordingly. The person to whom such warrant is directed may hold the criminal in custody and convey him within the jurisdiction of the foreign State, and should such criminal escape out of such custody he may be retaken in the same manner as a person escaping from lawful custody in England (*k*).

(*b*) *Re Siletti, R.* v. *Holloway Prison (Governor)* (1902) 71 L. J. (K. B.) 935.

(*c*) *Re Guerin* (1888), 58 L. J. (M. C.) 42; *R.* v. *Brixton Prison (Governor), Ex parte Guerin* (1907), *Times*, 15th June.

(*d*) *Re Castioni*, [1891] 1 Q. B. 149; *Re Siletti, R.* v. *Holloway Prison (Governor), supra.*

(*e*) Crown Office Rules, 1906, r. 231; *Re Guerin, supra.*

(*f*) *Ex parte Alice Woodhall* (1888), 20 Q. B. D. 832, C. A.; *R.* v. *Brixton Prison (Governor), Ex parte Savarkar* (1910), 26 T. L. R. 561, C. A.; and see title CROWN PRACTICE, Vol. X., p. 74.

(*g*) *Ex parte Widemann* (1866), 14 L. T. 719; *Re Coppin* (1866), 2 Ch. App. 47; *Ex parte Lapierre* (1906), *Times*, 6th July.

(*h*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 11. If the surrender is delayed beyond two months the fugitive may claim to be discharged from custody and obtain his discharge unless sufficient cause is shown to the contrary.

(*i*) For form of warrant see, *ibid.*, Sched. II.

(*k*) *Ibid.*, s. 11.

Offence within English jurisdiction.

969. A fugitive criminal who has been accused or convicted of an offence within English jurisdiction other than that for which his surrender has been demanded by the foreign State cannot be surrendered until his acquittal or the expiry of his sentence, as the case may be (*l*).

Demand by more than one State.

970. Where a fugitive offender is demanded by more than one foreign State the claims rank in the order of their reception (*m*).

SUB-SECT. 9.—*Discharge after Committal.*

Discharge after committal.

971. If the fugitive criminal who has been committed for extradition is not surrendered and conveyed out of the United Kingdom within two months after such committal, or if a writ of *habeas corpus* is issued after the decision of the court upon the return to the writ, any judge of the High Court may, upon application made to him by or on behalf of the criminal and upon proof that reasonable notice of his intention to make such application has been given to the Secretary of State, order the criminal to be discharged out of custody unless sufficient cause is shown to the contrary (*n*).

SECT. 4.—*Extradition of Offenders from British Possessions.*

Application of Acts to British possession.

972. When the Extradition Acts are applied by Order in Council to any treaty, unless by such Order it is otherwise provided, they extend to every British possession (*o*), but with certain modifications (*p*).

Requisition for surrender.

973. The requisition for surrender is made to the governor (*a*) by any person recognised by that governor as a consul-general, consul, or vice-consul (*b*), or, if the fugitive criminal has escaped from a colony or dependency of the foreign State on behalf of

(*l*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 3 (3). Proceedings upon a claim for extradition by a foreign State may be instituted before the sentence has expired and an order of committal for extradition made to take effect upon such expiry, and the prisoner may be surrendered under such order although at the date of the surrender, but not at the date of the extradition proceedings, the fugitive had become by the law of the foreign country exempted from prosecution by reason of lapse of time (*R.* v. *Brixton Prison* (*Governor*), *Ex parte Van der Auwera*, [1907] 2 K. B. 157). In that case Lord ALVERSTONE, C.J., declined to express an opinion as to the validity of proceedings for committal taken after such a period had elapsed as would prevent the offence being subject to punishment in the foreign country.

(*m*) *R.* v. *Kams* (1900), *Times*, 30th April.

(*n*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 12. As to discharge in case of political offences, see p. 408, *ante*.

(*o*) *Ibid.*, s. 17. By s. 26 the term "British possession" means any colony, plantation, island, territory, or settlement within His Majesty's dominions, and not within the United Kingdom, the Channel Islands, and the Isle of Man; and all colonies, plantations, islands, territories, and settlements under one legislature are deemed to be one British possession.

(*p*) As to suspension of the operation of the Extradition Acts in British possessions, see title DEPENDENCIES AND COLONIES, Vol. X., p. 563.

(*a*) This means any person or persons administering the government of a British possession, and includes the governor of any part of India (Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 26).

(*b*) Including any consular officer of a foreign State (Extradition Act, 1873 (36 & 37 Vict. c. 60), s. 7).

SECT. 4. Extradition of Offenders from British Possessions.

which the requisition is made, as the governor of such colony or dependency (*c*).

No warrant required.

974. No warrant of a Secretary of State is required, and the governor of the British possession may do all that can be done in such a case by a Secretary of State and police magistrate or either of them (*d*).

Remand or committal.

975. The fugitive criminal may be remanded or committed (*e*) to any prison in the British possession.

Powers of judges.

976. A judge of any court exercising in the British possession the like powers as are exercised in England by the King's Bench Division may exercise the power of discharging a criminal when not conveyed within two months out of such British possession (*f*).

Extradition treaties with Indian native States.

977. The Extradition Acts do not affect the lawful powers of His Majesty or the Governor-General of India in Council to make treaties for the extradition of criminals with Indian native States or with other Asiatic States conterminous with British India, and to carry into execution the provisions of any such treaties (*g*).

SECT. 5.—*Extradition of Offenders from Foreign States.*

Application to Home Office.

978. Any person may apply for the extradition of a fugitive criminal guilty of an extradition crime (*h*) who has fled to a foreign country which has entered into an extradition treaty with the United Kingdom (*i*). The application is made to the Secretary of State for the Home Department (*k*), with a statement of the facts of the case and the necessary information to enable the fugitive to be arrested, together with a warrant of arrest (*l*), a sufficient description of the fugitive, and any other forms required by the treaty applying to the particular case (*m*).

How made.

Indemnity as to expenses.

979. Except in cases where the application is by the Public Prosecutor, an indemnity in respect of expenses is also required by the Secretary of State for the Home Department (*n*).

(*c*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 17 (1).

(*d*) *Ibid.*, s. 17 (2).

(*e*) *Ibid.*, s. 17 (3).

(*f*) *Ibid.*, s. 17 (4). As to suspension of operation of the Extradition Acts in British possessions when the surrender of fugitive criminals is provided for by the legislature (which, by the Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 26, means any person or persons who can exercise legislative authority in a British possession, and, where there are local legislatures as well as a central legislature, means the central legislature only), see title DEPENDENCIES AND COLONIES, Vol. X., pp. 563, 564, and in addition to the Orders in Council there specified, see Orders in Council:—(British India), 21st November, 1895, 7th March, 1904; (Trinidad), 28th June, 1880.

(*g*) Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 23; see also title DEPENDENCIES AND COLONIES, Vol. X., pp. 603, 621.

(*h*) See p. 406, *ante*.

(*i*) For a list of such countries and the dates of the treaties, see p. 404, *ante*. The actual text of the treaty governing the particular case should in every case be consulted.

(*k*) See title CONSTITUTIONAL LAW, Vol. VII., pp. 82 *et seq.*

(*l*) As to warrants of arrest, see p. 408, *ante*.

(*m*) Information supplied by the Home Office for the special purposes of this title.

(*n*) *Ibid.*

SECT. 5. Extradition of Offenders from Foreign States.

980. The warrant of arrest and copies of the depositions are forwarded through the Foreign Office to the British Representative in the country where the fugitive is believed to be, and it is the duty of such Representative to make a formal application to the Sovereign or President of the foreign State for the arrest and surrender of the fugitive (*o*).

Trial of offenders surrendered by foreign State.

981. When a person extradited from a foreign State is brought to trial in England, the trial is conducted in every respect as if it were an ordinary criminal trial, and the same rules of procedure and evidence are applied (*p*).

Part II.—Surrender of Fugitive Offenders between different Portions of the British Dominions.

SECT. 1.—*Persons and Offences to which the Statutory Provisions apply.*

SUB-SECT. 1.—*Application of the Statutory Provisions by Order in Council and Local Act or Ordinance.*

Orders in Council

982. The Act governing this matter is the Fugitive Offenders Act, 1881 (*q*). His Majesty in Council may from time to time make Orders for the purposes of the Act and revoke and vary any Orders so made, and every Order so made, while in force, has statutory effect (*r*). The Order, however, must be laid before Parliament as soon as may be after it is made (*s*).

Application of provisions to British possessions.

983. By Order in Council, Part II. (*t*) of the Act may be applied (*u*) to groups of British possessions (*v*), and by Order in

(*o*) In the United States of America the application for arrest may be made direct to the particular court having jurisdiction to arrest the fugitive by the consular officer or some other person duly authorised by the diplomatic representative (*Benson* v. *McMahon* (1887), 127 U. S. 457; Revised Statutes of the United States, s. 5270; and see title CONSTITUTIONAL LAW, Vol. VI., p. 428).

(*p*) A prisoner may be tried in England even if the name under which he was surrendered be not his true name (*R.* v. *Finkelstein and Truscovitch* (1886), 16 Cox, C. C. 107); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 335 *et seq.*

(*q*) 44 & 45 Vict. c. 69, referred to, in this part of the title, as "the Act."

(*r*) *I bid.*, s. 31.

(*s*) *Ibid.*

(*t*) This part deals with the inter-colonial backing of warrants and offences.

(*u*) Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 12.

(*v*) See Statutory Rules and Orders Revised, Vol. V., Fugitive Criminal, pp. 324—327. The following groupings have been made by Orders in Council:— 23rd August, 1883, New South Wales, Victoria, South Australia, Queensland, New Zealand, Tasmania, Western Australia, Fiji; 29th November, 1884, s 1, West Indies—Jamaica, Turk's and Caicos Islands, British Guiana, Trinidad, Tobago, Leeward Islands, Barbados, St. Vincent, Grenada, St. Lucia, Bahamas.

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Persons and Offences etc.

Council the application may be limited by such conditions, exceptions and qualifications as may be deemed expedient (*w*).

Application to places outside British dominions.

984. By Order in Council His Majesty may, from time to time, direct that the Act shall apply to a place outside his dominions (*x*) as if such place were a British possession (*y*).

Incorporation with Imperial Act of local Ordinance.

985. By Order in Council the Crown may incorporate (*a*) with the Imperial Act any Act or Ordinance passed by the legislature (*b*) of a British possession for defining the offences committed in that possession to which the Imperial Act should apply (*c*), or for determining the court or person by whom and the manner in

British Honduras; 12th December, 1885, s 1, India, Ceylon and Straits Settlements; 12th December, 1885, Straits Settlements, Hong Kong, Labuan; 28th November, 1889, Morocco Order in Council, s. 33, Statutory Rules and Orders Revised, Vol. V., Foreign Jurisdiction, p. 425, Morocco, Gibraltar and Malta; 15th March, 1893, Pacific Order in Council, s. 85, *ibid.*, p. 484, the Pacific Ocean, namely, the Friendly Islands, the Navigators Islands, the Union Islands, the Phœnix Islands, the Ellice Islands, the Gilbert Islands, the Solomon Islands (so far as not within the jurisdiction of the German Empire), the Santa Cruz Islands, Fiji; 8th August, 1899, Ottoman Order in Council, s. 52, *ibid.*, p. 742, the Ottoman dominions, Malta, Gibraltar; 7th October, 1889, Somaliland Order in Council, s. 8, *ibid.*, p. 173, the Somaliland Protectorate, Aden, Zanzibar, the East Africa and Uganda Protectorates, British India; 11th August, 1902, East Africa Order in Council, s. 13, *ibid.*, p. 68, Uganda, Zanzibar, East Africa Protectorate, all British possessions and protectorates in Africa south of the Equator; 24th October, 1904, s. 88, Statutory Rules and Orders, 1904, p. 224, China, Corea, Wei-hai-wei, and Hong Kong; 4th April, 1906, s. 74, Statutory Rules and Orders, 1906, p. 253, Siam and its dependencies, Straits Settlements; 11th May, 1906, s. 15, *ibid.*, p. 199, Zanzibar, the East Africa and Uganda Protectorates, British India, Aden, Mauritius, all British possessions and protectorates in Africa south of the Equator.

(*w*) Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 12.

(*x*) For a recent treatment of the meaning of "dominions," see *R.* v. *Crewe* (*Earl*), *Ex parte Sekgome*, [1910] 2 K. B. 576, *per* VAUGHAN WILLIAMS, L.J., at p. 607, and *per* KENNEDY, L.J., at p, 622.

(*y*) *Ibid.*, s. 36. This has been done in the cases of Africa, s. 79 (15th October, 1889); Africa (Central), s. 13, which repeals the last cited Order as to British Central Africa (11th August, 1902); Africa (East), s. 13, and Uganda Protectorate (11th August, 1902); Africa (South), s. 1, including Colony of Cape of Good Hope, Colony of Natal, Basutoland, Orange River Colony, Transvaal, the Bechuanaland Protectorate, Southern Rhodesia, Barotsiland, North West Rhodesia, British Central Africa Protectorate, North Eastern Rhodesia (8th August, 1901); Africa (West), s. 2, including the Gambia Protectorate, Gambia, the Sierra Leone Protectorate, Sierra Leone, the Lagos Protectorate, Lagos, the Northern territory of the Gold Coast, the Gold Coast, Ashanti, Northern Nigeria, Southern Nigeria (11th June, 1902); Brunei, s. 33 (24th July, 1901); China, s. 88 (24th October, 1904), s. 1 (11th February, 1907), s. 1 (18th October, 1909); Corea, s. 88 (24th October, 1904); Cyprus, s. 42 (11th July, 1881); Egypt (see Turkey); Morocco, s. 33 (28th November, 1889); Ottoman Dominions (see Turkey); Pacific Islands, s. 85 (15th March, 1893); Persia (Inland), s. 287 (13th December, 1889); Persia (Coast and Islands), s. 8 (7th May, 1907); Siam, s. 74 (4th April, 1906), s. 1 (28th June, 1909); Somaliland, s. 8 (7th October, 1899); Turkey (Ottoman Dominions) s. 52 (8th August, 1899); Uganda, s. 13 (11th August, 1902); Zanzibar, s. 15 (11th May, 1906). These Orders are printed in the Statutory Rules and Orders, *sub tit.* Foreign Jurisdiction.

(*a*) Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 32.

(*b*) This means, where there are local legislatures as well as a central legislature, the central legislature only (Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 39).

(*c*) *Ibid.*, s. 32 (1).

which jurisdiction and power under the Act should be exercised (*d*); or for directing the payment of costs incurred in the execution of the Act (*e*); or for giving effect in any manner to the Imperial Act in that possession (*f*).

Channel Islands and Isle of Man.

986. The Act extends to the Channel Islands and the Isle of Man as if they were part of England, and the United Kingdom and those islands are deemed for the purpose of the Act to be one part of His Majesty's dominions (*g*).

SUB-SECT. 2.—*Application to Persons.*

Application to persons.

987. The statutory provisions apply to all persons accused of having committed an offence in one part of His Majesty's dominions who, having left that part, may be found in some other part of His Majesty's dominions (*h*). These provisions apply in like manner to convicts unlawfully at large before the expiration of their sentences (*i*).

SUB-SECT. 3.—*Application to Offences.*

Application to offences.

988. The statutory provisions apply to treason and piracy and to every offence which is for the time being punishable in that part of His Majesty's dominions in which it was committed, either on indictment (*k*) or information, by imprisonment with hard labour (*l*) for twelve months or more, or by any greater punishment, and they so apply although the offence charged is no offence at all in that part of His Majesty's dominions in which the fugitive is, or to which he is, or is suspected of being, on his way (*m*).

The Act applies in cases where the offence is committed before the commencement of the Act or before it is applied to a British possession or to the offence, in like manner as if such offence had been committed after such commencement or application (*n*).

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SUB-SECT. 1.—*Return of Fugitives.*

Indorsement of the warrant.

989. Where a warrant has been issued in one part of His Majesty's dominions for the apprehension of a fugitive from that part, any of the following authorities in another part of His Majesty's dominions in or on the way to which the fugitive is or is suspected to be, that is to say, (i.) a judge of a superior court

(*d*) Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 32 (2).
(*e*) *Ibid.*, s. 32 (3).
(*f*) *Ibid.*, s. 32 (4). This has been done by Order in Council dated 7th March, 1904, in relation to Chap. IV. of the Indian Extradition Act, 1903; by Order in Council dated 22nd October, 1906, in relation to "an Act to provide for the more convenient administration of the Fugitive Offenders Act, 1881, of the Imperial Parliament" passed by the Parliament of Natal.
(*g*) Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 37.
(*h*) *Ibid.*, s. 2.
(*i*) *Ibid.*, s. 34.
(*k*) This means, as regards India, an offence punishable on a charge or otherwise (*ibid.*, s. 39).
(*l*) Rigorous imprisonment and any confinement in a prison combined with labour, by whatever name it is called.
(*m*) Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 9.
(*n*) *Ibid.*, s. 38.

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of such part; and (ii.) in the United Kingdom a Secretary of State and one of the magistrates of the metropolitan police court at Bow Street; and (iii.) in a British possession (*o*) the governor (*p*) of that possession, if satisfied that the warrant was issued by some person having lawful authority to issue the same, may indorse such warrant (*q*). This indorsement must be signed by the authority indorsing the same, and authorises all or any of the persons named in the indorsement and all or any of the persons to whom the warrant was originally directed, and also every constable (*r*), to execute the warrant, within that part of His Majesty's dominions or place within which such indorsement is sufficient authority, by apprehending the person named in it and bringing him before some magistrate (*s*) in the said part or place (*a*). He need not necessarily be the same magistrate as is named in the indorsement (*b*). The warrant so indorsed remains effective and in force, notwithstanding that the person signing the warrant or such indorsement dies or ceases to hold office (*b*), and is a sufficient authority to apprehend the fugitive in that part of His Majesty's dominions in which it is indorsed and bring him before a magistrate (*c*).

Effect of indorsement of warrant.

Search warrant.

990. Where a warrant for the apprehension of a person accused of an offence has been indorsed in pursuance of any part of the Act, in any part of His Majesty's dominions, or where any part of the Act provides for the place of trial of a person accused of an offence, every court and magistrate of that part in which the warrant is indorsed, or in which the person accused of the offence can be tried, has the same power of issuing a warrant to search for any property alleged to be stolen or otherwise to be unlawfully taken or obtained by such person, or otherwise to be the subject of such offence, as that court or magistrate would have if the property had been stolen or otherwise unlawfully taken or obtained or if the offence had been committed wholly within the jurisdiction of such court or magistrate (*d*).

(*o*) This means any part of His Majesty's dominions, exclusive of the United Kingdom, the Channel Islands and Isle of Man; all territories and places within His Majesty's dominions which are under one legislature are deemed to be one British possession and one part of His Majesty's dominions (Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 39).

(*p*) This means any person or persons administering the government of a British possession, and includes the governor and lieutenant-governor of any part of India (*ibid.*).

(*q*) Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 3; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 308.

(*r*) This means, out of England, any policeman or officer having the like powers and duties as a constable in England (Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 39).

(*s*) This means, except in Scotland, any justice of the peace, and in Scotland a sheriff or sheriff-substitute, and in the Channel Islands, the Isle of Man, and a British possession, any person having authority to issue a warrant for the apprehension of persons accused of offences and to commit such persons for trial (Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 39).

(*a*) *Ibid.*, s. 26.

(*b*) *Ibid.*

(*c*) *Ibid.*, s. 3.

(*d*) *Ibid.*, s. 24. As to search warrants, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 310.

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Provisional warrant.

991. A magistrate of any part of His Majesty's dominions may issue a provisional warrant for the apprehension of a fugitive who is, or is suspected of being, in or on his way to that part, on such information and in such circumstances as would in his opinion justify the issue of a warrant if the offence of which the fugitive is accused had been committed within his jurisdiction, and such warrant may be backed and executed accordingly (*e*).

The magistrate who issues such a provisional warrant is required to send a report of the issue, together with the information or a certified copy thereof if he is in the United Kingdom, to one of His Majesty's principal Secretaries of State, and if he is in a British possession to the governor of that possession, and the Secretary of State or the governor may, if he think fit, discharge the person apprehended under such warrant (*f*).

Conveyance of fugitive, and witnesses.

992. Where a fugitive or prisoner is authorised to be returned to any part of His Majesty's dominions, such fugitive may be sent thither in any ship belonging to His Majesty or any of his subjects, and for this purpose the authority signing the warrant for the return may order the master of any ship belonging to any subject of His Majesty bound to the said part of those dominions to receive and afford a passage and subsistence during the voyage to such fugitive or prisoner, and to the person having him in custody, and to the witnesses, but such master cannot be required to receive more than one fugitive or prisoner for every hundred tons of his ship's registered tonnage, nor more than one witness for every fifty tons of such tonnage (*g*). The said authority must indorse or cause to be indorsed upon the agreement of the ship such particulars with respect to any fugitive, prisoner or witness sent in her as the Board of Trade from time to time require (*h*).

Every such master is required, on the ship's arrival in the said part of His Majesty's dominions, to cause such fugitive or prisoner, if not already in the custody of any person, to be given into the custody of some constable, there to be dealt with according to law.

Every master who fails, on payment or tender of a reasonable amount for expenses, to comply with such an order, or to cause the fugitive or prisoner committed to his charge to be given into custody if so required, is liable upon summary conviction to a fine not exceeding £50 (*i*). A prisoner so being removed by sea is deemed to be in legal custody until he reaches the place to which he is required to be removed (*j*).

Escape of fugitive.

993. If a prisoner escape from lawful custody, he may be retaken in the same manner as a person accused of a crime against the law of that part of His Majesty's dominions to which he escapes may be retaken upon an escape, and a person who escapes or

(*e*) Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 4.
(*f*) *Ibid.*
(*g*) *Ibid.*, s. 27.
(*h*) *Ibid.*
(*i*) *Ibid.* The penalty is recoverable in like manner as a penalty of the same amount under the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60); see s. 681 of that Act; and for duties of the master of a ship, generally, see title SHIPPING AND NAVIGATION.
(*j*) Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 25.

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attempts to escape, or who aids or attempts to aid a prisoner to escape, may be tried in that part of the dominions to which or from which the prisoner is being removed, or in which he escapes, or in which he is found (*k*).

Trial.

The fugitive, when apprehended, is brought before a magistrate (*l*), who hears the case in the same manner and has the same jurisdiction and powers (as near as may be), including the power to admit to bail (*m*), as if the fugitive was charged with an offence committed within his jurisdiction (*n*).

A magistrate before whom the fugitive is brought who has no power to exercise jurisdiction must order the fugitive to be brought before some other magistrate having such power, and that order must be obeyed (*o*).

Remand.

A fugitive apprehended on a provisional warrant may be from time to time remanded for such reasonable time, not exceeding seven days at any one time, as in the circumstances seems requisite for the production of an indorsed warrant (*p*).

Adjoining British possessions.

994. Where two British possessions adjoin, a person accused of an offence committed on or within the distance of five hundred yards from the common boundary of such possessions may be apprehended, tried and punished in either of such possessions (*q*).

Offence committed on a journey.

995. Where an offence is committed on any person or in respect of any property in or upon any carriage, cart, or vehicle whatsoever employed in a journey, or on board any vessel whatsoever employed in a navigable river, lake, canal, or inland navigation, the person accused of such offence may be tried in any British possession through a part of which such carriage, cart, vehicle, or vessel passed in the course of the journey or voyage during which the offence was committed (*r*). Where the side, bank, centre, or other part of the road, river, lake, canal, or inland navigation along which the carriage, cart, vehicle, or vessel passed in the course of such journey or voyage is the boundary of any British possession, a person may be tried for such offence in any British possession of

(*k*) Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 28.

(*l*) This means, in England, a chief magistrate of the metropolitan police courts or one of the other magistrates of the metropolitan police court at Bow Street; in Scotland, the sheriff or sheriff-substitute of the county of Edinburgh; in Ireland, one of the police magistrates of the Dublin metropolitan police district; and in a British possession, a judge, justice of the peace, or other officer having the like jurisdiction as one of the magistrates of the metropolitan police court at Bow Street, or such other court, judge, or magistrate as may be from time to time provided by an Act or ordinance passed by the legislature of that possession (Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 30).

(*m*) These words do not occur in the Extradition Acts, but the subject has been already dealt with (see p. 414, *ante*). The power to admit to bail ought to be exercised with extreme care and caution (*R.* v. *Spilsbury*, [1898] 2 Q. B. 615). Bail was granted in *R.* v. *Brixton Prison (Governor), Ex parte Percival*, [1907] 1 K. B. 696. [In *R.* v. *Harvey* (1895), not reported, cited Biron and Chalmers, Extradition, p. 50, WRIGHT, J., is said to have admitted a prisoner to bail after committal and pending return.—*Ed.*]

(*n*) Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 5.

(*o*) *Ibid.*, s. 30.

(*p*) *Ibid.*, s. 5.

(*q*) *Ibid.*, s. 20.

(*r*) *Ibid.* s 21.

which it is the boundary (*s*). These provisions are, however, not to authorise the trial for such offence of a person who is not a British subject where it is not shown that the offence was committed in a British possession (*s*).

False depositions.

996. A person accused of the offence, under whatever name it is known, of swearing or making any false deposition, or of giving or fabricating any false evidence, for the purposes of the Act, may be tried in that part of His Majesty's dominions in which such deposition or evidence is used or in which the same was sworn, made, given, or fabricated, as the case may require (*t*).

Place of trial.

997. Where any part of the Act provides for the place of trial of a person accused of an offence, that offence, for all purposes of and incidental to the apprehension, trial and punishment of such person, and of and incidental to any proceedings and matters preliminary, incidental to, or consequential thereon, and of and incidental to the jurisdiction of any court, constable, or officer with reference to such offence, and to any person accused of such offence, is deemed to have been committed in any place in which the person accused of the offence can be tried for it; and such person may be punished in accordance with the Courts (Colonial) Jurisdiction Act, 1874 (*u*).

Where accused can be tried in more than one place.

998. Where a person accused of an offence can, by reason of the nature of the offence or of the place in which it was committed or otherwise, be tried for the offence in more than one part of His Majesty's dominions, a warrant for the apprehension of such person may be issued in any part of those dominions in which he can, if he is there, be tried; and each part of the Act applies as if the offence had been committed in that part of His Majesty's dominions where such warrant is issued, and such person may be apprehended and returned in pursuance of that Act notwithstanding that in the place in which he is apprehended a court has jurisdiction to try him (*x*). If such person is apprehended in the United Kingdom a Secretary of State, and if he is apprehended in a British possession the governor of that possession, may, if satisfied that, having regard to the place where the witnesses for the prosecution and for the defence are to be found and to all the circumstances of the case (*y*), it would be conducive to the interests of justice so to do, order such person to be tried in the part of His Majesty's dominions in which he is apprehended, and in such case any warrant previously issued for his return is not to be executed (*a*).

Where accused is already in custody.

999. Where a person accused of an offence is in custody in some part of His Majesty's dominions, and the offence is one for

(*s*) Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 21.
(*t*) *Ibid.*, s. 22.
(*u*) *Ibid.*, s. 23; see the Courts (Colonial) Jurisdiction Act, 1874 (37 & 38 Vict. c. 27).
(*x*) Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 33; see also title DEPENDENCIES AND COLONIES, Vol. X., pp. 503 *et seq.*, 557.
(*y*) Convenience may be such a circumstance (*R.* v. *Vyner* (1903), 68 J. P. 142).
(*a*) Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 33; see also title DEPENDENCIES AND COLONIES, Vol. X., pp. 503, 557.

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or in respect of which, by reason of the nature thereof or of the place in which it was committed or otherwise, a person may be tried in some other part of His Majesty's dominions, in such case a superior court (*b*), and also, if such person is in the United Kingdom, a Secretary of State, and, if he is in a British possession, the governor of that possession, if satisfied that, having regard to the place where the witnesses for the prosecution and for the defence are to be found and to all the circumstances of the case, it would be conducive to the interests of justice so to do, may by warrant direct the removal of such offender to some other part of His Majesty's dominions in which he can be tried, and the offender may be returned and, if not prosecuted or acquitted, sent back free of cost in like manner as if he were a fugitive returned in pursuance of Part I. of the Act (*c*), and the warrant were a warrant for the return of such fugitive, and the provisions of the Act apply accordingly (*d*).

Evidence.

1000. If the indorsed warrant for the apprehension of the fugitive is duly authenticated, and such evidence (*e*) is produced as, subject to the provisions of the Act, according to the law ordinarily administered by the magistrate, raises a strong or probable presumption that the fugitive committed the offence mentioned in the warrant (*f*) and that the offence is one to which Part I. of the Act applies (*g*), the magistrate must commit the fugitive to prison to await his return (*h*). A magistrate may take depositions (*i*) in the absence of the fugitive in like manner as if such person were present and accused of the offence before him. Depositions, whether taken in the absence of the fugitive or otherwise, and copies thereof, and official certificates of, or judicial documents stating, facts, may, if duly authenticated (*k*), be received

(*b*) This means, in England, the Court of Appeal and the High Court of Justice; in Scotland, the High Court of Justiciary; in Ireland, the Court of Appeal and the High Court of Justice at Dublin; in a British possession, any court having in that possession the like criminal jurisdiction to that which is vested in the High Court of Justice in England, or such court or judge as may be determined by any Act or ordinance of that possession (Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 39).

(*c*) See pp. 421, 423, *ante*.

(*d*) Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 35.

(*e*) Colonial law, like foreign law, must be proved by evidence (*R.* v. *Brixton Prison (Governor), Ex parte Percival*, [1907] 1 K. B. 696); see title EVIDENCE, Vol. XIII., pp. 488, 492; see also Evidence (Colonial Statutes) Act, 1907 (7 Edw. 7, c. 16), s. 1; and title DEPENDENCIES AND COLONIES, Vol. X., p. 544.

(*f*) Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 5.

(*g*) See p. 421, *ante*.

(*h*) The magistrate must act only when there is a strong and probable presumption that the person charged had committed the offence, but whether or not the superior court has power to review the question whether the matters before the magistrate raised a strong or probable presumption is as yet undecided (*R.* v. *Vyner* (1903), 68 J. P. 142).

(*i*) This includes any affidavit, affirmation, or statement made upon oath (Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 39).

(*k*) Warrants and depositions and copies thereof and official certificates of a judicial document stating facts are to be deemed duly authenticated for the purposes of the Act if they are authenticated in manner provided for the time being by law, or if they purport to be signed by or authenticated by the signature of a judge, magistrate, or officer of the part of His Majesty's dominions in which the same are issued, taken, or made, and are authenticated either by

in evidence in the proceedings under the Act, but nothing in the Act is to authorise the reception of any such depositions, copies, certificates, or documents in evidence against a person upon his trial for an offence (*l*).

Committal or discharge.

1001. When the magistrate commits the fugitive to prison he must inform the fugitive that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus* or other like process (*m*). The magistrate must also send a certificate of the committal and such report of the case as he may think fit, if in the United Kingdom to a Secretary of State, and if in a British possession, to the governor of that possession (*n*).

Application for *habeas corpus*.

The application for a writ of *habeas corpus* is made in the same way as the application for the same writ where the applicant is committed for extradition (*o*). No appeal lies from the decision of the King's Bench Division to the Court of Appeal (*p*).

Surrender.

1002. Upon the expiration of fifteen days after a fugitive has been committed to prison to await his return, or if a writ of *habeas corpus* or other like process is issued with reference to such fugitive by a superior court, after the final decision of the court in the case, if the fugitive is so committed in the United Kingdom a Secretary of State, or if the fugitive is so committed in a British possession the governor of that possession, may, if he thinks it just, by warrant under his hand order the fugitive to be returned to that part of His Majesty's dominions from which he is a fugitive, and for that purpose to be delivered into the custody of the persons to whom the warrant is addressed, or of some one or more of them, and to be held in custody, and conveyed by sea or otherwise to the said part of His Majesty's dominions, to be dealt with there in due course of law as if he had been there apprehended, and such warrant must be forthwith executed according to the tenor thereof. The governor or other chief officer of any prison, on request of any person having the custody of a fugitive under any such warrant, and on payment or tender of a reasonable amount for expenses, must receive such fugitive and detain him for such reasonable time as may be requested by the said person for the purpose of the proper execution of the warrant (*q*).

Discharge after committal.

1003. If a fugitive, who has been committed to prison in any part of His Majesty's dominions to await his return, is not

the oath (including affirmation or declaration (Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 3)) of some witness, or by being sealed with the official seal of a Secretary of State, or with the public seal of a British possession, or of a Colonial Secretary, or of some secretary or minister administering a department of the government of a British possession. All courts and magistrates must take judicial notice of every such seal as is here mentioned, and must admit in evidence, without further proof, the documents authenticated by it (*ibid.*, s. 29).

(*l*) *Ibid.*, s. 29.

(*m*) *Ibid.*, s. 5.

(*n*) *Ibid.*

(*o*) See p. 415, *ante*.

(*p*) *R.* v. *Brixton Prison* (*Governor*), *Ex parte Savarkar* (1910), 26 T. L. R. 561, C. A.

(*q*) Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 6.

SECT. 2. Procedure.

conveyed out of that part within one month after such committal, a superior court, upon application by or on behalf of the fugitive and upon proof that reasonable notice of the intention to make such application has been given, if the said part is the United Kingdom, to a Secretary of State, and if the said part is a British possession to the governor of the possession, may, unless sufficient cause is shown to the contrary, order the fugitive to be discharged out of custody (*r*).

Order for discharge.

Where it is made to appear to a superior court (*s*) that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, be unjust, or oppressive, or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, such court may discharge the fugitive, either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order as to the court seems just (*t*).

Return of accused.

1004. Where a person accused of an offence and returned to any part of His Majesty's dominions either is not prosecuted for the said offence within six months after his arrival in that part, or is acquitted of the said offence, then if that part is the United Kingdom a Secretary of State, and if that part is a British possession the governor of that possession, may, if he think fit, on the request of such person, cause him to be sent back free of cost and with as little delay as possible to the part of His Majesty's dominions in or on his way to which he was apprehended (*u*).

Ireland.

1005. In Ireland the Lord Lieutenant or the Chief Secretary may, as well as a Secretary of State, execute any portion of the powers vested in a Secretary of State by Part I. of the Act (*v*).

SUB-SECT. 2.—*Inter-Colonial backing of Warrants.*

Backing of warrants.

1006. Where in a British possession, of a group to which Part II. of the Act applies (*a*), a warrant has been issued for the apprehension of a person accused of an offence punishable in that

(*r*) Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 7.

(*s*) The Court of Appeal, as a superior court within the meaning of that expression in the Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), has jurisdiction to entertain an application for relief by the applicant under that Act, where that application has not already been adjudicated upon in the King's Bench Division (*R.* v. *Brixton Prison* (*Governor*), *Ex parte Savarkar* (1910), 26 T. L. R. 561, C. A.).

(*t*) Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 10. The fact that the applicant would under the provisions of a statute in operation in India be tried by a judge alone, and not by a jury, is not a ground for saying that his return to India would be unjust and oppressive within this section (*R.* v. *Brixton Prison* (*Governor*), *Ex parte Savarkar, supra*).

(*u*) Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 8. This section is permissive only, and a fugitive may be tried upon charges other than those to meet which he is returned (*R.* v. *Philips* (1858), 1 F. & F. 105; *R.* v. *Cohen* (1907), 71 J. P. 190).

(*v*) Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 11.

(*a*) See note (*v*), p. 419, *ante*.

possession, and such person is, or is suspected of being, in or on the way to another British possession of the same group, a magistrate in the last-mentioned possession, if satisfied that the warrant was issued by a person having lawful authority to issue the same, may indorse such warrant (*b*), and the warrant so indorsed is a sufficient authority to apprehend, within the jurisdiction of the indorsing magistrate, the person named in the warrant and bring him before the indorsing magistrate or some other magistrate in the same possession (*c*).

Summonses to witnesses.

1007. Where a person required to give evidence on behalf of the prosecutor or defendant on a charge for an offence punishable by law in a British possession of such a group is or is suspected of being in or on his way to any other possession of the same group, a judge, magistrate, or other officer who would have lawful authority to issue a summons (*d*) requiring the attendance of such witness, if the witness were within his jurisdiction, may issue a summons for the attendance of such witness, and a magistrate in any other possession of the same group, if satisfied that the summons was issued by some judge, magistrate, or officer having lawful authority so to do, may indorse the summons with his name; and the witness, on service in that possession of the summons, so indorsed, and on payment or tender of a reasonable amount for his expenses, must obey the summons, and in default is liable to be tried and punished either in the possession in which he is served or in the possession in which the summons was issued, and is liable to the punishment imposed by the law of the possession in which he is tried for the failure of a witness to obey such a summons (*e*).

Provisional warrants.

1008. A magistrate in a British possession of such a group (*f*), before the indorsement of a warrant for the apprehension of any person, may issue a provisional warrant for the apprehension of that person on such information and in such circumstances as would, in his opinion, justify the issue of a warrant if the offence of which such person is accused were an offence punishable by the law of the said possession, and had been committed within his jurisdiction, and such warrant may be backed and executed accordingly; provided that a person arrested under such provisional warrant must be discharged unless the original warrant is produced and indorsed within such reasonable time as may in the circumstances seem requisite (*g*).

Return of prisoner.

1009. The magistrate before whom a person so apprehended is brought, if he is satisfied that the warrant is duly authenticated and was issued by a person having lawful authority to issue the same, and is satisfied by evidence on oath that the prisoner is the person

(*b*) See p. 422, *ante*.
(*c*) Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 13.
(*d*) This includes any subpœna or other process for requiring the attendance of a witness (*ibid.*, s. 15).
(*e*) *Ibid.*
(*f*) See note (*v*), p. 419, *ante*.
(*g*) Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 16.

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named or otherwise described in the warrant, may order such prisoner to be returned to the British possession in which the warrant was issued, and for that purpose to be delivered into the custody of the persons to whom the warrant is addressed, or of any one or more of them, and to be held in custody and conveyed by sea or otherwise into that possession, there to be dealt with according to law as if he had been there apprehended. Such order for return may be made by warrant under the hand of the magistrate making it, and may be executed according to the tenor thereof. A magistrate, so far as is requisite for the exercise of these powers, has the same power, including the power to remand a prisoner and admit him to bail, as he has in the case of a person apprehended under a warrant issued by him (*h*).

Discharge of prisoner.

1010. Where the return of a prisoner is sought or ordered, the court or magistrate may discharge the prisoner either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order as to the magistrate or court seems just. Any order or refusal to make an order of discharge by a magistrate under this section is subject to an appeal to a superior court (*i*).

Where prisoner whose return is authorised is not returned.

1011. If a prisoner in a British possession, whose return is authorised, is not conveyed out of that possession within one month after the date of the warrant ordering his return, a magistrate or a superior court, upon application by or on behalf of the prisoner, and upon proof that reasonable notice of the intention to make such application has been given to the person holding the warrant and to the chief officer of the police of such possession or of the province or town where the prisoner is in custody, may, unless sufficient cause is shown to the contrary, order such prisoner to be discharged out of custody. Any order or refusal to make an order of discharge by a magistrate under this section is subject to an appeal to a superior court (*k*).

Return of prisoner on acquittal or non-prosecution.

1012. Where a prisoner accused of an offence is returned to a British possession, and either is not prosecuted for the said offence within six months after his arrival in that possession or is acquitted of the said offence, the governor of that possession, if he thinks fit, may, on the requisition of such person, cause him to be sent back, free of cost, and with as little delay as possible, to the British possession in which, or on his way to which, he was apprehended (*l*).

(*h*) Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 14; and see p. 424, *ante*.

(*i*) *Ibid.*, s. 19. The grounds upon which such discharge or other order may be made are similar to those upon which a like order may be made in the case of a fugitive under *ibid.*, s. 10; see p. 428, *ante*.

(*k*) Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 17.

(*l*) *Ibid.*, s. 18. As to inter-colonial removal of prisoners, see title DEPENDENCIES AND COLONIES, Vol. X., p. 564.

EXTRAORDINARY RESOLUTION.

See COMPANIES.

EXTRAORDINARY TRAFFIC.

See HIGHWAYS, STREETS, AND BRIDGES; RAILWAYS AND CANALS.

EXTRA-TERRITORIALITY.

See CONSTITUTIONAL LAW; DEPENDENCIES AND COLONIES; FISHERIES; SHIPPING AND NAVIGATION.

EYE-WITNESS.

See EVIDENCE.

EYOT.

See FISHERIES; WATERS AND WATERCOURSES.

FACTORIES AND SHOPS.

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PART 1. Classification and Definitions.

Part I.—Classification and Definitions.

Places to which Acts apply.

1013. The places to which the Factory and Workshop Acts (*a*) apply are either factories, workshops, or workplaces (*b*).

If, in a place to which the Acts apply, mechanical power is used, that place is a factory and not a workshop (*c*); but a place may be a factory although no such power is used (*d*).

SECT. 1.—*Factories.*

Factories to which Acts apply.

1014. A "factory" is either a textile factory or a non-textile factory (*e*).

SUB-SECT. 1.—*Textile Factories.*

Definition of textile factory.

1015. The expression "textile factory" means any premises wherein or within the close or curtilage (*f*) of which steam (*g*), water or other mechanical power (*h*) is used to move or work any machinery employed in preparing, manufacturing or finishing cotton, wool, hair, silk, flax, hemp, jute, tow, china-grass, cocoa-nut fibre or other like material, either separately or mixed together or mixed with any other material, or any fabric made of any of those materials, or in any process incident to the manufacture thereof (*i*). But print works, bleaching and dyeing works, lace warehouses, paper mills, flax scutch mills, rope works and hat works are not textile factories (*k*).

(*a*) *I.e.*, the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), and the Factory and Workshop Act, 1907 (7 Edw. 7, c. 39) (see s. 7 of the latter Act, by which both these Acts are to be construed as one), for the purpose of brevity called "the Acts" in this title). The administration of the Acts is part of the duties of the Secretary of State for the Home Department; see title CONSTITUTIONAL LAW, Vol. VII., p. 83; and p. 527, *post*. The statute law relating to factories and shops may be said to be in a state of transition. The following pages give the effect of the legislation and decisions up to the date of publication, but further changes are not improbable in the near future.

(*b*) As to workplaces, see p. 445, *post*.

(*c*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 149.

(*d*) See the list of such places in the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), Sched. VI., Part I., p. 437, *post*.

(*e*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 149.

(*f*) As to what places are within the area of the factory, see p. 443, *post*.

(*g*) A place where a boiler is used is not necessarily a place where steam power is used (*Doswell* v. *Cowell* (1906), 95 L. T. 38, C. A., *per* COZENS-HARDY, L.J., at p. 41). In that case, however, it was held that a shop where tripe was prepared for sale by using hot water supplied by a boiler into which the necessary cold water was introduced by steam pressure was a place where steam power was used in aid of a manufacturing process, and, therefore, a "factory," following *Petrie* v. *Weir* (1900), 2 F. (Ct. of Sess.) 1041; see, also, *Murphy* v. *O'Donnell* (1905), 54 W. R. 149, C. A.

(*h*) "Other mechanical power" means power *ejusdem generis* with steam or water power, and does not include hand power (*Willmott* v. *Paton*, [1902] 1 K. B. 237, C. A).

(*i*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 149 (1). Places where the following processes are carried on have been held to be textile factories within the similar definitions in the earlier Factory Acts, namely, winding sewing thread on to spools (*Haydon* v. *Taylor* (1863), 33 L. J. (M. C.) 30); casing steel strips with cotton fabric (*Whymper* v. *Harney* (1865), 34 L. J. (M. C.) 113); manufacture of braces from leather and webbing (*Taylor* v. *Hickes* (1862), 31 L. J. (M. C.) 242).

(*k*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 149 (1).

Definition of non-textile factory.

1016. The expression "non-textile factory" means any of the following places (*l*)—namely (*m*), print works, bleaching and dyeing works, earthenware works, lucifer-match works, percussion-cap works, cartridge works, paper-staining works, fustian-cutting works, blast furnaces, copper mills, iron mills, foundries, metal and india-rubber works, paper mills, glass works, tobacco factories, letter-press printing works, bookbinding works, flax scutch mills, and electrical stations; also any of the following premises or places, provided that within the premises or within their close, curtilage, or precincts (*n*) steam, water, or other mechanical power (*o*) is used in aid of the manufacturing process there carried on (*p*)—namely (*l*), hat works, rope works, bakehouses, lace warehouses, shipbuilding yards, quarries, pit-banks, dry cleaning, carpet beating and bottle washing works, together with such laundries (*q*) as are carried on by way of trade or for the purpose of gain (*r*), or as ancillary to another business or incidentally to the purpose of any public institution; also any premises wherein or within the close or curtilage or precincts of which any manual labour (*s*) is exercised by way of trade or for purposes of gain (*r*) in or incidentally to any of the following purposes—

(*l*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 149 (1).

(*m*) For definitions of certain of these places, see pp. 438—440, *post*.

(*n*) As to what places are within the area of the factory, see p. 443, *post*.

(*o*) See notes (*g*) and (*h*), p. 436, *ante*.

(*p*) To wash bottles by mechanical power in a beer-bottling establishment is not to use mechanical power "in aid of" the process of bottling beer (*Law* v. *Graham*, [1901] 2 K. B. 327); nor is it to shake the dust occasionally out of sorted rags by means of a "shaker" worked by electricity, for although the bits of cloth are cleaned their nature is not altered (*Paterson* v. *Hunt* (1909), 101 L. T. 571). To use a grindstone driven by mechanical power in a stone-dressing yard for sharpening the tools of workmen employed in the yard is a process "in aid of" the process of stone-dressing (*Petrie* v. *Weir* (1900), 2 F. (Ct. of Sess.) 1041). The words "manufacturing process" do not necessarily refer to something produced, but to the business carried on (*Owner* v. *Cottingham Sanitary Steam Laundry Co., Ltd.* (1910), 74 J. P. 219).

(*q*) Factory and Workshop Act, 1907 (7 Edw. 7, c. 39), s. 1; and see p. 461, *post*. A laundry carried on for the purpose of gain and in which mechanical power is used for driving machines used in aid of the work of washing clothes is within the definition (*Owner* v. *Cottingham Sanitary Steam Laundry Co., Ltd., supra*).

(*r*) "By way of trade or for purposes of gain" means for purposes of sale and for direct, not indirect, gain (*Nash* v. *Hollinshead*, [1901] 1 K. B. 700, C. A.). Accordingly, grinding meal on a farm for the purpose of feeding the farm stock, and not for purposes of sale, is not within the expression, though if the meal were intended to be sold as an article of commerce it might be (*ibid., per* ROMER, L.J., at p. 707); nor is the employment of persons by a fishing boat owner for the repair of nets used solely in the fishing business (*Curtis* v. *Skinner* (1906), 95 L. T. 31). The washing of hotel linen, or the clothing of visitors, in the hotel laundry, was also excluded in *Caledonian Rail. Co.* v. *Paterson* (1898), 1 Fraser (Justiciary Cases), 24; but see Factory and Workshop Act, 1907 (7 Edw. 7, c. 39), s. 1, and *supra*; see also *Mooney* v. *Edinburgh and District Tramways Co.* (1901), 4 F. (Ct. of Sess.) 390 (repair of tramcars), which case, however, was, in *Curtis* v. *Skinner*, *supra*, held inconsistent with *Nash* v. *Hollinshead*, *supra*, and therefore not followed. Manual labour exercised by a young person or child in a recognised efficient school during school hours, for the purpose of instructing him in any art or handicraft, is not exercised "for the purpose of gain" (Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 149 (6)).

(*s*) "Manual labour" does not necessarily mean labour requiring the exertion

SECT. 1. Factories.

namely, the making of any article (*t*) or of part of any article; or the altering, repairing, ornamenting, finishing, or adapting for sale (*a*) of any article; provided that within the premises or within their close, curtilage, or precincts (*b*) steam, water, or other mechanical power (*c*) is used in aid of the manufacturing process (*d*) there carried on (*e*).

"Print works."

"Print works" means any premises in which any persons are employed to print figures, patterns or designs upon any cotton, linen, woollen, worsted or silken yarn, or upon any woven or felted fabric not being paper (*f*).

"Bleaching and dyeing works."

"Bleaching and dyeing works" means any premises in which the processes of bleaching, beetling, dyeing, calendering, finishing, hooking, lapping and making up and packing any yarn or cloth of any material, or the dressing or finishing of lace, or any one or more of such processes, or any process incidental thereto, are or is carried on (*f*). Premises where hooking, lapping, making up and packing are carried on are within the definition, although none of those processes are there carried on incidentally to bleaching or dyeing (*g*).

"Earthenware works."

"Earthenware works" means any place in which persons work for hire in making or assisting in making, finishing or assisting in

of considerable strength. The substantial purpose for which the place is used must be the employment of persons in manual labour which is not merely incidental to the main duty of the persons exercising it (*Hoare* v. *Green* (*Robert*), *Ltd.*, [1907] 2 K. B. 315, where it was held that the arranging of flowers into wreaths and crosses with the help of wood and wire was the exercise of manual labour for the purpose of making an article and of adapting an article for sale). The term "manual labour" here used must be distinguished from the same term as used in the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90); see p. 517, *post*. "The Act of 1875 is dealing with persons, whereas the Act of 1901 is dealing with places" (*Hoare* v. *Green* (*Robert*), *Ltd.*, *supra*, *per* Lord ALVERSTONE, C.J., at p. 321).

(*t*) The term "article" does not apply to a ship (*Palmer's Shipbuilding Co.* v. *Chaytor* (1869), L. R. 4 Q. B. 209).

(*a*) "The adapting for sale of any article" does not mean an operation merely incidental to serving in a shop, whether carried on in the shop itself (*Fullers, Ltd.* v. *Squire*, [1901] 2 K. B. 209, packing sweetmeats in boxes for sale), or in an adjoining room (*Hoare* v. *Green* (*Robert*), *Ltd.*, *supra*); but if carried on after shop hours the work may be within the Act, if the articles which are the subject of the work are sold by retail during shop hours (*Fullers, Ltd.* v. *Squire*, *supra*). The processes of mixing carbonic acid gas with beer by mechanical means and then bottling the mixture (*Hoare* v. *Truman, Hanbury, Buxton & Co.* (1902), 86 L. T. 417; and see *Law* v. *Graham*, [1901] 2 K. B. 327; *per* Lord ALVERSTONE, C.J., at p. 330), and separating saleable from unsaleable refuse by mechanical power in the refuse works of a local authority (*Henderson* v. *Glasgow Corporation* (1900), 2 F. (Ct. of Sess.) 1127), are "adapting for sale"; but the mere sorting of rags for sale, although some of them are shaken by mechanical power to get out dirt, is not (*Paterson* v. *Hunt* (1909), 101 L. T. 571).

(*b*) As to what places are within the area of the factory, see p. 443, *post*.

(*c*) See notes (*g*) and (*h*), p. 436, *ante*.

(*d*) See note (*p*), p. 437, *ante*.

(*e*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 149 (1).

(*f*) *Ibid.*, Sched. VI., Part I.

(*g*) *Rogers* v. *Manchester Packing Co.*, [1898] 1 Q. B. 344. In *Howarth* v. *Coles* (1862), 31 L. J. (M. C.) 262, it was held that "finishing" which was not incidental to bleaching and dyeing was not within the now repealed stat. (1860) 23 & 24 Vict. c. 78, s. 7. Such a case would be within the existing definition.

finishing earthenware or china of any description, except bricks and tiles not being ornamental tiles (*h*).

"Lucifer-match works" means any place in which persons work for hire in making lucifer matches or in mixing the chemical materials for making them, or in any other process incidental thereto, except the cutting of the wood (*h*). "Lucifer-match works."

"Percussion-cap works" means any place in which persons work for hire in making percussion caps or in mixing or storing the chemical materials for making them, or in any other process incidental thereto (*h*). "Percussion-cap works."

"Cartridge works" means any place in which persons work for hire in making cartridges, or in any process incidental thereto, except the manufacture of the material that is used in making the cases of the cartridges (*h*). "Cartridge works."

"Paper-staining works" means any place in which persons work for hire in printing a pattern in colours upon sheets of paper, either by blocks applied by hand or by rollers worked by steam, water or other mechanical power (*h*). "Paper-staining works."

"Fustian-cutting works" means any place in which persons work for hire in fustian cutting (*h*). "Fustian-cutting works."

"Blast furnaces" means any blast furnace or other furnace or premises, in or on which the process of smelting or otherwise obtaining any metal from the ores is carried on (*h*). "Blast furnaces."

"Iron mills" means any mill, forge or other premises in or on which any process is carried on for converting iron into malleable iron, steel or tin plate, or for otherwise making or converting steel (*h*). "Iron mills."

"Foundries" means iron foundries, copper foundries, brass foundries and other places in which the process of founding or casting any metal is carried on; except places in which such process is carried on by not more than five persons and as subsidiary to the repair or completion of some other work (*h*). "Foundries."

"Metal and india-rubber works" means any premises in which steam, water, or other mechanical power is used for moving machinery employed in the manufacture of machinery or of any article of metal not being machinery, or of india-rubber or gutta-percha, or of articles made wholly or partially of india-rubber or gutta-percha (*h*). "Metal and india-rubber works."

"Paper mills," "glass works" and "tobacco factories" mean any premises in which is carried on the manufacture of paper, glass, or tobacco (*h*). "Paper mills," "glass works," "tobacco factories."

"Letter-press printing works" and "bookbinding works" mean any premises in which are carried on the processes of letter-press printing or bookbinding (*h*). "Letter-press printing works." "bookbinding works."

"Electrical stations" means any premises, or that part of any premises, in which electrical energy is generated or transformed for the purpose of supply by way of trade (*i*) or for the lighting of any street, public place or public building, or of any hotel, or of any "Electrical stations."

(*h*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), Sched. VI., Part I.

(*i*) See note (*r*), p. 437, *ante*.

SECT. 1. Factories.

railway, mine or other industrial undertaking (*j*). A workhouse is a "public building" within the definition (*k*).

"Hat works."

"Hat works" means any premises in which is carried on the manufacture of hats or any process incidental thereto (*l*).

"Rope works."

"Rope works" means any premises being a ropery, ropewalk or rope work in which is carried on the laying or twisting or other process of preparing or finishing the lines, twines, cords or ropes and in which machinery moved by steam, water or other mechanical power (*m*) is not used for drawing or spinning the fibres of flax, hemp, jute or tow (*n*), and which has no internal communication with any buildings or premises joining or forming part of a textile factory, except such as is necessary for the transmission of power (*l*).

"Bakehouses."

"Bakehouses" (*o*) means any places in which are baked bread, biscuits or confectionery, from the baking or selling of which a profit is derived (*l*).

"Lace warehouses."

"Lace warehouses" means any premises, room or place not included in bleaching and dyeing works as hereinbefore defined (*p*), in which persons are employed upon any manufacturing process or handicraft in relation to lace, subsequent to the making of lace upon a lace machine moved by steam, water or other mechanical power (*l*).

"Shipbuilding yards."

"Shipbuilding yards" means any premises in which any ships, boats or vessels used in navigation are made, finished or repaired (*l*). The definition does not include a dock or other place where repairs are only occasionally done to ships (*q*).

"Quarries."

"Quarries" (*r*) means any place, not being a mine, in which persons work in getting slate, stone, coprolites or other minerals (*l*).

"Pit-banks."

"Pit-banks" (*s*) means any place above ground adjacent to a shaft of a mine, in which place the employment of women is not regulated by the Coal Mines Regulation Act, 1887 (*t*) or the Metalliferous Mines Regulation Act, 1872 (*u*), whether such place does or does not form part of the mine within the meaning of those Acts (*l*).

"Dry cleaning works," "carpet beating works," "bottle washing works."

"Dry cleaning, carpet beating, and bottle washing works" means places where the sole or principal business carried on is dry cleaning, carpet beating or bottle washing (*l*). If such work is carried on incidentally to some other industry or business, the place is not within the definition (*v*).

(*j*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), Sched. VI., Part I.
(*k*) *Mile End Union* v. *Hoare*, [1903] 2 K. B. 483.
(*l*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), Sched. VI., Part II.
(*m*) See notes (*g*) and (*h*), p. 436, *ante*.
(*n*) If the fibres are drawn or spun by mechanical power the works would be a textile factory; see s. 149 (1), and p. 436, *ante*.
(*o*) See p. 458, *post*, for special provisions as to bakehouses, and for definition of "underground bakehouse," see p. 459, *post*.
(*p*) See p. 438, *ante*.
(*q*) *Spencer* v. *Livett, Frank & Son*, [1900] 1 Q. B. 498, C. A.
(*r*) For special provisions as to quarries, see pp. 472, 502, *post*.
(*s*) See, further, title MINES, MINERALS AND QUARRIES.
(*t*) 50 & 51 Vict. c. 58.
(*u*) 35 & 36 Vict. c. 77.
(*v*) The wine cellar of an hotel in which bottle-washing is carried on

SUB-SECT. 3.—*Domestic Factories.*

1017. A "domestic factory" is a private house, room or place which, though used as a dwelling, is by reason of the work carried on there a "factory" and in which neither steam, water, nor other mechanical power (*x*) is used in aid of the manufacturing process carried on there and in which the only persons employed are members of the same family dwelling there (*a*). Definition.

SUB-SECT. 4.—*Tenement Factories.*

1018. A "tenement factory" is a factory where mechanical power (*x*) is supplied from a common source (*b*) to different parts of the same building occupied by different persons, for the purpose of any manufacturing process or handicraft, in such manner that those parts constitute in law separate factories (*c*). For the purpose of the provisions with respect to tenement factories, all buildings situate within the same close or curtilage are treated as one building (*d*). Definition.

SUB-SECT. 5.—*Places included as Factories for certain Purposes.*

1019. For certain purposes (*e*) docks, wharves, quays and warehouses (*f*), buildings in course of construction (*g*), and some railway sidings (*h*) are included in the term "factory." Factories for special purposes.

SECT. 2.—*Workshops.*

SUB-SECT. 1.—*In General.*

1020. A "workshop" means any of the following premises or places (*i*)—namely (*k*), hat works, rope works, bakehouses, lace warehouses, shipbuilding yards, quarries, pit banks, dry cleaning works, carpet beating works, bottle washing works, or such laundries (*l*) as are carried on by way of trade or for the purpose of gain, or carried on as ancillary to another business, or incidentally to the purposes of any public institution, wherein or within the close or curtilage or precincts of which (*m*) steam, water, or other Definition.

incidentally to the business of hotel-keeping is, accordingly, not a bottle washing works within the Act (*Kavanagh* v. *Caledonian Rail. Co.* (1903), 5 F. (Ct. of Sess.) 1128).

(*x*) See notes (*g*) and (*h*), p. 436, *ante*.

(*a*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 115.

(*b*) *Brass* v. *London County Council*, [1904] 2 K. B. 336, following *Toller* v. *Spiers and Pond, Ltd.*, [1903] 1 Ch. 362.

(*c*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 149 (1). For special provisions as to tenement factories, see p. 532, *post*. As to separate factories, see p. 443, *post*.

(*d*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 149 (1).

(*e*) See pp. 483—487, *post*.

(*f*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 104; and see p. 483, *post*.

(*g*) *Ibid.*, s. 105; and see p. 485, *post*.

(*h*) *Ibid.*, s. 106; and see p. 486, *post*. A railway siding may also be part of a workshop (*ibid.*). For railway sidings, generally, see title RAILWAYS AND CANALS.

(*i*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 149 (1).

(*k*) For definitions of these places, see p. 440, *ante*.

(*l*) Factory and Workshop Act, 1907 (7 Edw. 7, c. 39), s. 1.

(*m*) As to what places are within the precincts, see p. 443, *post*.

SECT. 2. Workshops.

mechanical power (*n*) is not used in aid of the manufacturing process carried on there (*o*); also any premises, room or place, not being a factory, in which premises, room or place or within the close, or curtilage or precincts of which (*p*), any manual labour (*q*) is exercised by way of trade or for purposes of gain (*r*) in or incidentally to the making of any article (*s*) or of part of any article, or to the altering, repairing, ornamenting, finishing or adapting for sale (*t*) of any article; provided that the employer of the persons working therein has the right of access or control thereto or thereover (*u*). A place is not the less a workshop for the reason that it is used for the purpose of teaching a trade or handicraft (*a*).

SUB-SECT. 2.—*Domestic Workshops.*

Definition.

1021. A "domestic workshop" means a private house, room or place which, though used as a dwelling, is, by reason of the work carried on there, a "workshop," and in which neither steam, water, nor other mechanical power (*b*) is used in aid of the manufacturing process carried on, and in which the only persons employed are members of the same family dwelling there (*c*).

Domestic workshops not within the Act.

The exercise in a private house or private room by the family dwelling therein, or by any of them, of manual labour (*d*) by way of trade, or for the purposes of gain (*e*), in or incidentally to straw plaiting, pillow-lace making, glove making, or to any other handicraft of a light character named by the Secretary of State in a special Order (*f*), or to any handicraft where the labour is exercised at irregular intervals and does not furnish the whole or principal means of living to the family, does not of itself constitute the house or room a workshop (*g*).

SUB-SECT. 3.—*Tenement Workshops.*

Definition.

1022. The expression "tenement workshop," which is included in the term "workshop" (*h*), means any workplace (*i*) in which, with the permission of or under agreement with the owner or

(*n*) See notes (*g*) and (*h*), p. 436, *ante*.
(*o*) If mechanical power were used the places in question would be "non-textile factories"; see p. 437, *ante*.
(*p*) As to what places are within the precincts, see p. 443, *post*.
(*q*) See note (*s*), p. 437, *ante*.
(*r*) See note (*r*), p. 437, *ante*.
(*s*) See note (*t*), p. 438, *ante*.
(*t*) See note (*a*), p. 438, *ante*.
(*u*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 149 (1).
(*a*) *Beadon* v. *Parrott* (1871), L. R. 6 Q. B. 718.
(*b*) See notes (*g*) and (*h*), p. 436, *ante*.
(*c*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 115; compare definition of "domestic factory," p. 441, *ante*.
(*d*) See note (*s*), p. 437, *ante*.
(*e*) See note (*r*), p. 437, *ante*.
(*f*) No order is at present in force under this provision. As to the Secretary of State and the administrative Government office, see p. 527, *post*.
(*g*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 114; and Factory and Workshop Act, 1907 (7 Edw. 7, c. 39), s. 4.
(*h*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 149 (1).
(*i*) For the meaning of this expression, see p. 445, *post*.

occupier, two or more persons carry on any work which would constitute the place a workshop if the persons working therein were in the employment of the owner or occupier (*k*).

SUB-SECT. 4.—*Men's Workshops and Women's Workshops.*

"Men's workshops."

1023. "Men's workshops" are workshops conducted on the system of not employing any woman, young person or child (*l*) therein (*m*).

"Women's workshops."

"Women's workshops" are workshops conducted on the system of not employing therein either children or young persons (*n*).

SECT. 3.—*Separate Factories or Workshops.*

Factory or workshop in open air.

1024. In order that any particular work may come within the Acts (*o*) it must be carried on in some particular premises or place (*p*), but a place is not excluded from the definition of factory or workshop only by reason of the fact that it is in the open air (*q*).

Area of factory or workshop.

1025. Subject to the exceptions mentioned below, the area of the factory or workshop is the whole space contained within its walls (*r*).

Separate factories or workshops in same building.

1026. More than one factory or workshop may be contained in a single building or group of buildings; and different parts of the same building may constitute separate factories or workshops (*s*). A part of a factory or workshop may, with the approval in writing of the chief inspector, be taken for the purposes of the Acts to be a separate factory or workshop (*t*), and the Secretary of State may by special Order (*u*) direct, with respect to any class of

(*k*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 149 (1). Compare the definition of "tenement factory," p. 441, *ante*.

(*l*) For definitions, see p. 445, *post*.

(*m*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 157.

(*n*) *I bid.*, s. 29; and see note (*l*), *supra*.

(*o*) See p. 436, *ante*.

(*p*) *George* v. *Macdonald* (1901), 4 F. (Ct. of Sess.) 190, *per* Lord ADAM, at p. 194. In that case a traction engine hauling a threshing machine was held not to be a factory while in transit. "'Premises' does not mean any place which may be momentarily covered in the course of a journey by a traction engine hauling a machine" (*ibid.*).

(*q*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 149 (5).

(*r*) "In the case of factories . . . etc. . . . the walls or fences built around the factory . . . fix the boundaries and determine the area" (*Back* v. *Dick Kerr & Co., Ltd.*, [1906] A. C. 325, *per* Lord ATKINSON, at p. 334, quoted and followed by COZENS-HARDY, M.R., in *Rimmer* v. *Premier Gas Engine Co.* (1907), 97 L. T. 226, C. A., at p. 228).

(*s*) *Brass* v. *London County Council*, [1904] 2 K. B. 336, where KENNEDY, J., at p. 341, said, "I cannot help thinking that we should be in great difficulties if we were to hold that the mere fact of one factory overlapping another caused them to be within the same curtilage."

(*t*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 149 (2).

(*u*) In the exercise of this power, the Secretary of State has made orders affecting the following industries:—(1) Industries in which overtime may be worked by women under s. 49 of the Act of 1901, a list of which will be found on pp. 498, 499, *post* (Order of 27th March, 1897, No. 226); (2) Bookbinding, hat making, bonbon making, and Christmas present making (Order of 27th March, 1897, No. 227); (3) Manufacture of edged tools (Order of 19th January, 1899,

SECT. 3. **Factories or Separate Workshops.**

factories or workshops, that different branches or departments of work carried on in the same factory or workshop shall, for all or any of the purposes of the Acts, be treated as if they were different factories or workshops (*a*). Also, where a place situate within the close, curtilage or precincts of a factory or workshop is solely used for some purpose other than the manufacturing process or handicraft carried on in the factory or workshop, that place is, if otherwise it would be a factory or workshop, deemed to be a separate factory or workshop (*b*).

Separate buildings constituting same factory or workshop.

1027. Separate buildings, even though a considerable distance apart, may, if used for one continuous manufacturing process, constitute a single factory or workshop (*c*). The place, however, where the product of a factory or workshop is delivered, even if directly connected with the place of production, is not necessarily part of the factory or workshop (*d*).

Part of factory or workshop may be excluded from Act.

1028. Part of a particular building or group of buildings constituting a factory or workshop, such as a room used solely for sleeping purposes (*e*), or a place solely used for some purpose other than the manufacturing process or handicraft carried on in the factory or workshop (*f*), may be excluded from the operation of the Act.

SECT. 4.—*Crown Factories and Workshops.*

Application to Crown factories and workshops.

1029. The Acts apply to factories and workshops belonging to the Crown (*g*), even though they are not carried on by way of trade nor for the purpose of gain (*h*); and in case of any public emergency the Secretary of State may, by Order, to the extent of and during the period named by him, exempt from the operation of the Acts any such factory or workshop, or any factory or workshop in respect of work which is being done on behalf of the Crown under a contract specified in the Order (*g*).

No jurisdiction by local authorities.

In Crown factories and workshops the powers conferred by the Acts upon a district council or other local authority (*i*) are exercised by the factory inspectors (*k*).

No. 9); (4) Manufacture of bright or burnished metal goods (Order of 6th September, 1900, No. 668); for these orders, see Statutory Rules and Orders Revised, Vol. IV., Factory and Workshop, pp. 86 *et seq.*; (5) Laundries (Order of 26th December, 1907, Statutory Rules and Orders, 1907, p. 138).

(*a*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 151.

(*b*) *Ibid.*, s. 149 (4).

(*c*) *Re London County Council and Tubbs* (1903), 68 J. P. 29 (separate houses, connected by an iron gangway); *Hardcastle* v. *Jones* (1862), 32 L. J. (M. C.) 49; *Coles* v. *Dickinson* (1864), 10 L. T. 616 (two mills, one in Manchester, and the other in Herts), following *Hoyle & Sons* v. *Oram* (1862), 31 L. J. (M. C.) 213.

(*d*) *Spacey* v. *Dowlais Gas and Coke Co.*, [1905] 2 K. B. 879, C. A. (gas pipes leading from a gas works).

(*e*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 149 (3).

(*f*) *Ibid.*, s. 149 (4); and see *Lewis* v. *Gilbertson & Co., Ltd.* (1904), 91 L. T. 377. But such a place may constitute a separate factory or workshop; see p. 443, *ante*.

(*g*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 150 (1).

(*h*) *Ibid.*, s. 150 (2).

(*i*) See pp. 454, 527, *post*.

(*k*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 150 (3).

SECT. 5.—*Workplaces.*

SECT. 5. Workplaces. Definition.

1030. A workplace is a definite and ascertainable area where work is being perpetually and permanently done (*l*).

SECT. 6.—*Institutions.*

Charitable or reformatory institutions.

1031. Where, in any premises forming part of an institution carried on for charitable or reformatory purposes, and not being premises subject to inspection by or under the authority of any Government Department, any manual labour (*m*) is exercised in or incidentally to the making, altering, repairing, ornamenting, finishing, washing, cleaning, or adapting for sale (*n*) of articles not intended for the use of the institution, the provisions of the Acts apply to those premises notwithstanding that the work carried on therein is not carried on by way of trade nor for the purposes of gain (*o*), or that the persons working therein are not working under a contract of service or apprenticeship (*p*).

SECT. 7.—*Other Definitions.*

Apprentices.

1032. For the purposes of the Acts an apprentice is deemed to work for hire (*q*).

"Parent."

The expression "parent" means a parent or guardian of, or person having the legal custody of, or the control over, or having direct benefit from the wages of, a young person or child (*r*).

"Woman."

The expression "woman" means a woman of the age of eighteen years and upwards (*s*).

"Young person."

The expression "young person" means a person who is fourteen and under eighteen years of age; or who being thirteen and under eighteen years of age has obtained a Board of Education certificate of having attained such standard of proficiency in reading, writing, and arithmetic, or of previous due attendance at a certified efficient school or a certified day industrial school, as may be prescribed by the Secretary of State, with the consent of the Board of Education (*t*). The Acts do not extend to any young person being a mechanic, artisan, or labourer working only in repairing either the machinery in, or any part of, a factory or workshop (*u*).

"Child."

The expression "child" means a person who is under the age of

(*l*) *Bennett* v. *Harding*, [1900] 2 Q. B. 397, *per* GRANTHAM, J., at p. 400, and *per* CHANNELL, J., at p. 401: but "I do not say that the mere presence of workmen in repairing a private house would make it a workplace" (*per* CHANNELL, J., *ibid.*). A cab yard, consisting of stables and a stable yard, is a workplace within the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 38 (*ibid.*); and see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*m*) See note (*s*), p. 437, *ante*.

(*n*) See note (*a*), p. 438, *ante*.

(*o*) See note (*r*), p. 437, *ante*.

(*p*) Factory and Workshop Act, 1907 (7 Edw. 7, c. 39), s. 5 (1).

(*q*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 152 (2).

(*r*) *Ibid.*, s. 156 (1).

(*s*) *Ibid.*

(*t*) *Ibid.*, ss. 71, 156 (1). As to these certificates, see title EDUCATION, Vol. XII., pp. 68, 69.

(*u*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 158.

SECT. 7. Other Definitions.

fourteen years, and, being of the age of thirteen, has not obtained the certificate of proficiency or attendance at school entitling him to be deemed a young person (*a*).

"Employment."

1033. There is deemed to be "employment" in a factory or workshop within the meaning of the Acts (save when otherwise provided) when a woman, young person, or child works therein, whether for wages or not, either in a manufacturing process or handicraft, or in cleaning any part of the factory or workshop used for any manufacturing process or handicraft or in cleaning or oiling any part of the machinery or in any other kind of work whatsoever incidental to or connected with such process or handicraft or connected with the article made or otherwise the subject of such process or handicraft therein (*b*).

Work done without order.

The mere fact that the person works to please himself, without orders from anyone, or even contrary to orders, does not make it any the less "employment" within the definition, nor is the provision a presumption capable of rebuttal by the employer showing that such person was not employed by him to do the work in question (*c*). A person may be employed within the meaning of the Acts, even though he is acting in a managing capacity, is not required to observe regular hours, and is partly remunerated by a share in the profits of the business (*d*).

Where continuous.

Employment is deemed to be continuous unless interrupted by an interval of at least half an hour (*e*).

"Machinery."

The expression "machinery" includes any driving strap or band (*f*).

"Mill-gearing."

The expression "mill-gearing" comprehends every shaft, whether upright, oblique or horizontal, and every wheel, drum or pulley or other appliance by which the motion of the first moving power is communicated to any machine appertaining to a manufacturing process (*g*).

"Night."

The expression "night" means the period between nine o'clock in the evening and six o'clock in the succeeding morning (*h*).

"Week."

The expression "week" means the period between midnight on Saturday night and midnight on the succeeding Saturday night (*i*).

"Bank holiday."

The expression "Bank holiday" means any one of the following days, namely:—Easter Monday, the Monday in Whitsun week, the

(*a*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), ss. 71, 156 (i.). As to these certificates, see title EDUCATION, Vol. XII., pp. 68, 69.

(*b*) *Ibid.*, s. 152 (1).

(*c*) *Prior* v. *Slaithwaite Spinning Co.*, [1898] 1 Q. B. 881; and see *Rogers* v. *Barlow & Son* (1906), 94 L. T. 519; but compare *Robinson* v. *Melville* (1890), 17 Rettie (Justiciary Cases), 62, and *Paterson* v. *Duke* (*D. & R.*) (1904), 6 Fraser (Justiciary Cases), 53, in which the Scottish court took the contrary view. In neither of the English cases was the attention of the court called to the Scottish decisions.

(*d*) *Graves* v. *Duncan* (1899), 1 Fraser (Justiciary Cases), 72.

(*e*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 156 (2).

(*f*) *Ibid.*, s. 156 (1).

(*g*) *Ibid.*; and see *Holmes* v. *Clarke* (1861), 6 H. & N. 349; affirmed (1862), 7 H. & N. 937, Ex. Ch.

(*h*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 156 (1); see, also, title TIME.

(*i*) *Ibid.* See, also, title TIME.

first Monday in August, and 26th December if a week-day, otherwise the 27th (*k*). SECT. 7. Other Definitions.

The "occupier" is the person who controls the factory or workshop and the work that is done there (*l*). "Occupier."

The expression "owner" means the person for the time being receiving the rack-rent of the lands or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent (*m*). "Owner."

The expression "process" includes the use of any locomotive (*n*). "Process."

Part II.—Health and Sanitary Provisions.

SECT. 1.—*General Provisions.*

SUB-SECT. 1.—*Overcrowding.*

1034. A factory (*o*), workshop (*p*), or workplace (*q*) must not be so overcrowded while work is carried on therein as to be dangerous or injurious to the health of the persons employed therein (*r*). A place is deemed to be dangerously or injuriously overcrowded if the number of cubic feet of space in any room bears to the number of persons employed at one time in the room a proportion less than 250 or, during any period of overtime (*s*), 400 cubic feet of space to every person (*a*). Overcrowding prohibited. What is overcrowding

In London, in considering whether any dwelling-house or part of a dwelling-house which is used also as a factory, workshop, or

(*k*) Holidays Extension Act, 1875 (38 & 39 Vict. c. 13), applied by Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 156 (1). See also title TIME.

(*l*) "'Occupier' plainly means the person who runs the factory . . ., who regulates and controls the work that is done there, and who is responsible for the fulfilment of the provisions of the Factory Act within it" (*Ramsay* v. *Mackie* (1904), 7 F. (Ct. of Sess.) 106, *per* Lord M'LAREN, at p. 109). A special meaning is attached to the expression "Occupier of a factory" in relation to docks, certain buildings, and railways by the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), ss. 104—106; see pp. 483—487, *post*.

(*m*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4, applied by Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 156 (1). For the cases decided under this definition, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*n*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 156 (1).

(*o*) For definition, see p. 436, *ante*.

(*p*) For definition, see p. 441, *ante*.

(*q*) For definition, see p. 445, *ante*.

(*r*) This is provided, as to factories other than domestic factories, by the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 1 (1) (c); as to workshops, workplaces, and domestic factories, by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 91; and as to workshops or workplaces in London, by the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 2 (1) (g); and places overcrowded contrary to the two last-mentioned Acts are nuisances (see Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), ss. 1 (2), 2 (1), (5)). As to nuisance under the Public Health Act, 1875 (38 & 39 Vict. c. 55), see title PUBLIC HEALTH AND LOCAL ADMINISTRATION. As to nuisances, generally, see title NUISANCE.

(*s*) As to overtime, generally, see p. 498, *post*.

(*a*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 3 (1).

SECT. 1. General Provisions.

workplace, or whether any factory, workshop, or workplace, which is used also as a dwelling-house, is a nuisance by reason of overcrowding, the court is to have regard to the circumstances of such other user (*b*).

Modification by special Order.

The Secretary of State may by special Order increase this allowance of air space for any period during which artificial light, other than electric light, is employed (*c*), or as regards any particular manufacturing process or handicraft (*d*), or where a workshop or workplace, not being a domestic workshop (*e*), is occupied by day as a workshop and by night as a sleeping apartment (*f*).

Notices.

There must be fixed in every factory and workshop a notice specifying the number of persons who may be employed in each room (*g*).

SUB-SECT. 2.—*Temperature.*

Reasonable temperature required.

1035. In every factory and workshop (except men's workshops (*h*)), adequate measures must be taken for securing and maintaining a reasonable temperature in each room in which any

(*b*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 2 (2) (ii.).

(*c*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 3 (2). Additional air space has been required by the Secretary of State in the following cases, either directly under this power or as a condition to exceptions granted under other sections of the same Act, namely:—

500 cubic feet in underground bakehouses and 400 feet between 9 p.m. and 6 a.m. in bakehouses (other than underground) where work is carried on by night by artificial light, other than electric light (Order of 30th December, 1903, [1903—No. 1157]); see, further, as to bakehouses, p. 458, *post*.

400 feet in workshops, other than domestic workshops, which are occupied by day as workshops and by night as sleeping places (Order of 17th January, 1902, [1902—No. 23]).

400 cubic feet in non-textile factories and workshops in which women and young persons are employed from 9 a.m. to 9 p.m. (Order of 26th December, 1907, made under s. 36 of the same Act, as to which see, further, p. 503, *post*).

400 cubic feet in non-textile factories and workshops where women are employed overtime on account of press of work (Order of 13th October, 1908, made under s. 49 of the same Act, as to which see, further, pp. 498—509, *post*).

500 cubic feet in the factories included in Sched. A of the Order, and 2,500 cubic feet in those in Sched. B, being factories exempted from the requirements of the Act as to limewashing or washing (Order of 2nd November, 1903, made under s. 1 of the same Act, as to which see, further, p. 449, *post*).

1,000 cubic feet in factories in which is carried on the spinning of artificial silk (Order of 20th July, 1899, as to which see, further, p. 506, *post*); and in textile factories in which the material used is flax, jute, or hemp (Order of 6th September, 1899, as to which see, further, p. 506, *post*), and to which the exemption as to the meal times of women, young persons and children authorised by s. 40 of the same Act is applied.

400 feet in factories and workshops in which women and young persons are employed in cleaning and preparing fruit in pursuance of the special exception as to period of employment, times for meals, and holidays (Order of 11th September, 1907, made under s. 41 of the same Act, as to which see, further, p. 507, *post*).

The regulations and special rules for dangerous and unhealthy industries (as to which see p. 479, *post*) also contain various requirements as to the amount of cubic feet of space per person to be provided.

(*d*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 3 (2).

(*e*) For definition, see p. 442, *ante*.

(*f*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 3 (3).

(*g*) *Ibid.*, s. 3 (4).

(*h*) *Ibid.*, s. 157. For definition, see p. 443, *ante*.

person is employed, but not so as to interfere with the purity of the air (*i*).

The Secretary of State may, by special Order, direct with respect to any class of factories or workshops (except men's workshops (*k*) and domestic factories or domestic workshops (*l*)) that thermometers be provided, and kept in working order, in such place and position as may be specified in the Order (*m*).

Special Order as to thermometers.

SUB-SECT. 3.—*Limewashing, Painting and Washing.*

1036. Every factory, workshop and workplace (*n*) must be kept in a cleanly state (*o*). In factories other than domestic factories (*a*) all the inside walls, ceilings and tops of the rooms (whether plastered or not), and all the passages and staircases, if they have not been painted with oil or varnished once at least within seven years, must (subject to any special exceptions (*b*)) be limewashed once at least in every fourteen months, to date from the time when they were last limewashed; and, if they have been so painted or varnished, must be washed with hot water and soap once at least in every fourteen months, to date from the time when they were last washed (*c*).

Cleanly state to be preserved.

Factories to be painted or limewashed.

Where it appears to the Secretary of State that in any class of

Exception by special Order.

(*i*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 6 (1). For a decision on facts as to what are adequate measures, see *Robinson* (*Peter*), *Ltd.* v. *Plowden* (1903), 67 J. P. 152 (quarter sessions). In that case it was held that a temperature varying from 54° to 61° in a dressmaker's workshop was reasonable; and in *Deane* v. *Barnes* (1901), 65 J. P. 235, a police magistrate held that one of 50° to 55° in similar premises was not. In addition, certain minima of temperature have been prescribed by the regulations and special rules for dangerous and unhealthy industries (see p. 479, *post*). Furthermore, in every place in which the weaving of cotton cloth is carried on the temperature must not be raised by any artificial means (except by gas used for lighting purposes) above 70°, except in so far as may be necessary for giving humidity to the atmosphere (*ibid.*, s. 90). As to cotton cloth factories generally, see p. 456, *post*.

(*k*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 157. For definition, see p. 443, *ante*.

(*l*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 111 (4) (e). For definition, see pp. 441, 442, *ante*.

(*m*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 6 (2). No special order has yet been made under this provision, but in dangerous and unhealthy industries, in addition to the requirements indicated in note (*i*), *supra*, thermometers are in most cases required to be fixed. As to the employment of thermometers in cotton cloth factories, see *ibid.*, s. 92. Moreover, in electrical stations to which exceptions are extended under *ibid.*, s. 40 (Order of 11th March, 1903, as to which see further p. 502, *post*), and also in factories and workshops where women and young persons are employed in cleaning or preparing fruit in pursuance of the special exceptions allowed by *ibid.*, s. 41 (Order of 11th September, 1907), thermometers are required to be kept affixed; see, further, pp. 506, 507, *post*.

(*n*) See p. 445, *ante*.

(*o*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 1 (1) (a); Public Health Act, 1875 (38 & 39 Vict, c. 55), s. 91; and Public Heath (London) Act, 1891 (54 & 55 Vict. c. 76), s. 2 (1) (g); see, also, note (*r*), p. 447, *ante*.

(*a*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 111 (5). For definition, see p. 441, *ante*.

(*b*) See Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 1 (4), and note (*d*), p. 450, *post*.

(*c*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 1 (3). For special provisions as to bakehouses, see *ibid.*, s. 99, and p. 458, *post*.

SECT. 1. General Provisions.

factories or parts thereof these provisions are not required, or are inapplicable, he may by special Order grant to that class a special exception that such provisions shall not apply thereto (*d*).

Workshops.

Powers of District Council.

1037. If, on the certificate of a medical officer of health or inspector of nuisances, it appears to any district council that the limewashing, cleansing or purifying of any workshop or part thereof is necessary for the health of the persons employed therein, the council must give notice in writing to the owner or occupier to limewash, cleanse or purify the same as the case may require (*e*). If the person to whom notice is so given fails to comply therewith within the time specified he is liable to a fine of 10*s*. a day during default, and the council may, if they think fit, cause the workshop or part to be limewashed, cleansed, or purified, and may recover in a summary manner (*f*) from the person in default the expenses incurred by them in so doing (*g*).

SUB-SECT. 4.—*Ventilation.*

In regard to impurities.

1038. Every factory, workshop, and workplace (*h*) must be ventilated in such a manner as to render harmless, so far as is

(*d*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 1 (4). By an Order dated 2nd November, 1903 [1903—No. 934] exemptions have been granted to:—(a) Blast furnaces, iron mills, copper mills, stone, slate, and marble works, brick and tile works in which unglazed bricks or tiles are made, cement works, chemical works, gas works, flax scutch mills in which neither children nor young persons are employed, and sugar factories; also the following parts of factories—namely, rooms used for the storage of articles and not for the constant carrying on therein of any manufacturing process; parts in which dense steam is continuously evolved in the process of manufacture; parts in which pitch, tar, or like material is used (except in brush works); parts in which unpainted or unvarnished wood is manufactured, and in which there are no glazed windows in walls or roof; the part of a glass factory known as the glass house; walls or tops of rooms made of glazed bricks, tiles, glass, slate, marble or galvanised iron, on condition that they are washed with soap and water at least once in every fourteen months; the tops of rooms at least twenty feet high; and the tops of rooms in print works, bleach works or dye works (except finishing rooms or warehouses), or in grist mills, or in works in which are carried on agricultural implement making, coach-making, engraving, the manufacture of starch, soap, and candles, and salting, tanning, or dressing hides and skins. (b) Shipbuilding works, gun factories, engineering works, electric generating works, frame dressing rooms of lace factories, and foundries other than foundries in which brass casting is carried on.

These exceptions are subject to the condition that there shall be 500 cubic feet of space in the places included in (a) and 2,500 in those in (b) for each person employed; and they do not apply to mess rooms, engine houses, fitting shops or sanitary conveniences, except as regards walls or tops of glazed bricks, tiles, glass, slate, marble or galvanised iron, which are washed with soap and water once every fourteen months; also the general obligation of keeping the factory in a cleanly state as prescribed by s. 1 (1) (a) of the same Act remains; and an inspector may require any part of the factory to which the exception applies to be limewashed or washed if it appears not to be in a cleanly state.

(*e*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 2 (3). For forms of notices, see Encyclopædia of Forms and Precedents, Vol. X., pp. 354, 355. As to London, see the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 25.

(*f*) See title MAGISTRATES.

(*g*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 2 (4).

(*h*) See p. 445, *ante*.

practicable, all the gases, vapours, dust or other impurities generated therein that may be injurious to health (*i*), and every factory (other than domestic factories (*k*) elsewhere than in London), workshop, and workplace must be kept free from effluvia arising from any drain, water-closet, earth-closet, privy, urinal or other nuisance (*l*).

Freedom from effluvia.

1039. Sufficient means of ventilation must be provided and sufficient ventilation maintained, in every room in any factory or workshop (*m*) (except domestic factories (*n*), domestic workshops (*n*) or men's workshops (*o*)). The Secretary of State may, by special Order, prescribe a standard of sufficient ventilation for any class of factories or workshops, and an Order made under this provision may supersede any provision of the Act (*p*) or any Order as to ventilation in cotton cloth factories (*q*).

Fresh air.

1040. If the occupier (*r*) of a factory or workshop (including a cotton cloth factory in which humidity of the atmosphere is artificially produced (*s*)) alleges that the whole or part of the expenses of providing the required means of ventilation ought to be borne by the owner (*t*), he may apply to a court of summary jurisdiction, who may make such order concerning the expenses, or their apportionment, as appears to the court to be just and equitable under the circumstances of the case, regard being had to the terms of any contract between the parties (*a*).

Expenses of providing ventilation.

(*i*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 1 (1) (d); Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 91; and Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 2 (1) (g); see also note (*r*), p. 447, *ante*.

(*k*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 111 (5).

(*l*) *Ibid.*, ss. 1 (1) (b), 2 (2); and Public Health (London) Act, 1891 (55 & 56 Vict. c. 76), s. 2 (1) (g).

(*m*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 7 (1).

(*n*) *Ibid.*, s. 111 (4) (e).

(*o*) *Ibid.*, s. 157 (1).

(*p*) See *ibid.*, s. 94 (3).

(*q*) *Ibid.*, s. 7 (2). By Order of the Secretary of State, dated 4th February, 1902 [1902—No. 79], it is directed that the means of ventilation to be provided and maintained in every textile factory (not being a cotton cloth factory) in which atmospheric humidity is artificially produced by steaming or other mechanical appliances, and in which special rules or regulations with respect to humidity are not for the time being in force, shall be such as to supply during working hours not less than 600 cubic feet of fresh air per hour for each person employed. There are special requirements as to ventilation in the Factory and Workshop Act, 1901 (1 Edw. c. 22), Part IV., referring to dangerous and unhealthy industries (see *ibid.*, s. 74, and p. 476, *post*); also in regard to cotton cloth and other humid factories (see *ibid.*, ss. 93, 94, and p. 447, *post*); also in many of the regulations and special rules for dangerous and unhealthy industries, as to which see p. 479, *post*. The Factory and Workshop Act, 1907 (7 Edw. 7, c. 39), s. 3, imposes special regulations as to ventilation in laundries (see p. 461, *post*).

(*r*) As to definition of occupier, see p. 447, *ante*.

(*s*) See Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), ss. 90—96; and p. 456, *post*.

(*t*) For statutory definition of owner, see p. 447, *ante*.

(*a*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 7 (4). Compare the similar provisions as to the expenses of making structural alterations to bakehouses, and of providing means of escape from fire, and the cases decided thereunder, at pp. 460, 468, 469, *post*.

SECT. 1. General Provisions.

SUB-SECT. 5.—*Drainage of Floors.*

When floors to be drained.

1041. In factories and workshops (other than domestic factories, domestic workshops (*b*) and men's workshops (*c*)), or parts thereof in which any process is carried on which renders the floor liable to be wet to such an extent that the wet is capable of being removed by drainage, adequate means must be provided for draining it off (*d*).

Removal of slush.

1042. In every tenement factory (*e*) constructed on or since 1st January, 1896, where grinding is carried on, every floor must be so constructed and maintained as to facilitate the removal of slush, and all necessary shoots, pits and other conveniences must be provided for facilitating such removal (*f*).

SUB-SECT. 6.—*Sanitary Conveniences.*

Accommodation to be provided.

1043. Every factory and workshop (and, in London, every factory, workshop, and workplace (*g*), and, in places where the Public Health Acts Amendment Act, 1890, Part III. (*h*), is in force (*i*) every building used as a workshop or manufactory, or where persons are employed or intended to be employed in any trade or business (*k*)) must be provided with sufficient and suitable sanitary conveniences, regard being had to the number of persons employed or in attendance, and also, where persons of both sexes are, or are intended to be, employed or in attendance, with proper separate conveniences for persons of each sex (*l*).

Where defined by special Order.

Except in London (*m*) and places where the Public Health Acts Amendment Act, 1890, Part III. (*n*), is in force (*o*) and in men's workshops (*p*), the Secretary of State determines, by special Order (*q*),

(*b*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 111 (4) (e). For definition, see pp. 441, 442, *ante*.

(*c*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 157. For definition, see p. 443, *ante*.

(*d*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 8 (1). The Factory and Workshop Act, 1907 (7 Edw. 7, c. 39), s. 3, makes special provision as to the drainage of floors in laundries, as do also certain of the regulations and special rules in dangerous and unhealthy industries (see p. 479, *post*).

(*e*) For definition, see p. 441, *ante*.

(*f*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 88 (1), and Sched. III.

(*g*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 38 (1).

(*h*) 53 & 54 Vict. c. 59.

(*i*) Part III. of the Act extends only to districts in which it is specially adopted (Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 2).

(*k*) *Ibid.*, s. 22 (1).

(*l*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 9. For the general powers of local authorities to require the provision of sanitary conveniences, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*m*) The Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 9, does not apply to the administrative county of London (*ibid.*). For provisions as to London, see Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 38, and p. 453, *post*.

(*n*) 53 & 54 Vict. c. 59.

(*o*) See note (*i*), *supra*.

(*p*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 157.

(*q*) By an Order of 4th February, 1903 [1903—No. 9], the Secretary of State has determined as follows:—One sanitary convenience for each twenty-five females, and one for each twenty-five males employed or in attendance;

what is sufficient and suitable accommodation within the meaning of the above provision (*r*).

Powers of local authority.

1044. In London the sanitary authority must (*a*), and in places where the Public Health Acts Amendment Act, 1890, Part III. (*b*), is in force (*c*) the urban authority may (*d*), where it appears to them that the requirements of these provisions are not complied with, require the owner or occupier of the factory, workshop, workplace, or other building in question to make the necessary alterations and additions, under a penalty not exceeding £20, and a daily penalty not exceeding 40*s.* (*e*). The notice should specify the alterations or additions required to be made (*f*).

In places where the Public Health Acts Amendment Act, 1890, Part III. (*g*), has not been adopted (except in London (*h*)), the local authority (*i*) may, by written notice, require the owner or occupier of any house used or intended to be used as a factory or building in which persons of both sexes are employed or intended to be employed at one time in any manufacture, trade or business, within the time therein specified, to construct a sufficient number of water-closets, earth-closets or privies, and ashpits for the separate use of each sex, under a penalty not exceeding £20, and a daily penalty not exceeding 40*s.* (*k*).

provided that where the number of males exceeds 100, and there is sufficient urinal accommodation, it is sufficient to provide one sanitary convenience for each twenty-five males up to the first hundred, and one for every forty afterwards; and where the number of males exceeds 500, if there is sufficient urinal accommodation, one sanitary convenience for every sixty males; proper control of the use thereof being required to be certified by the inspector. Odd numbers of persons count as twenty-five, forty, or sixty, as the case may be.

Every sanitary convenience must be kept in a cleanly state, sufficiently ventilated and lighted, must not communicate with any workroom except through the open air or an intervening ventilated space (special provision being made for workrooms in use prior to 1st January, 1903); must be under cover, partitioned off, conveniently accessible, and if for the use of females must have proper doors and fastenings; if both sexes are employed, the interiors of the conveniences must not be visible to persons at work, and, in the case of adjoining conveniences, the approaches to those for each sex must be separate.

(*r*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 9 (2).

(*a*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 38 (2).

(*b*) 53 & 54 Vict. c. 59.

(*c*) See note (*i*), p. 452, *ante*.

(*d*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 22 (2).

(*e*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 38 (2); Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 22 (3). For the procedure in enforcing these penalties, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*f*) *Tracey* v. *Pretty & Sons*, [1901] 1 K. B. 444, *per* Lord ALVERSTONE, C.J., at p. 452. Upon a summons for a penalty under this provision the justices have no jurisdiction to inquire into the suitability or sufficiency of the accommodation, and must confine themselves to the question whether the notice has been complied with (*ibid.*).

(*g*) 53 & 54 Vict. c. 59. When those provisions are in force the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 38, is repealed (Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 22 (4)).

(*h*) As to London, see *supra*.

(*i*) For definition, see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4.

(*k*) *Ibid.*, s. 38. For the general powers of local authorities to require the provision of sanitary conveniences, see title PUBLIC HEALTH AND LOCAL

SECT. 1. General Provisions.

SUB-SECT. 7.—*Enforcement of Requirements.*

Place not kept in conformity with Acts.

1045. If there is a contravention of the provisions as to cleanliness (*l*), freedom from effluvia (*m*), overcrowding (*n*), ventilation (*o*), temperature (*p*), drainage (*q*), or sanitary accommodation (*r*), in any factory to which those provisions apply, or if there is any contravention of the provisions as to temperature (*p*) or sanitary accommodation (*r*) in any workshop to which those provisions apply, such factory or workshop will be deemed not to be kept in conformity with the Acts (*s*).

When deemed a nuisance.

A workshop to which the provisions as to ventilation (*a*) or drainage (*b*) apply, a workshop or workplace (*c*) to which the provisions as to freedom from effluvia apply (*d*), and a workshop, workplace or domestic factory (*e*) to which the provisions as to cleanliness (*f*), freedom from effluvia (*g*), overcrowding (*f*), or ventilation (*f*) apply, will, if any of those provisions are contravened therein, be deemed to be a nuisance liable to be dealt with summarily under the law relating to public health (*h*).

Authority to inspector to act.

1046. If the Secretary of State is satisfied that the provisions of the Acts, or of the law relating to public health in so far as it affects factories, workshops, and workplaces, have not been carried out by any district council (which term includes the council of a county borough (*i*), the Court of Common Council of the City of London, and a metropolitan borough council (*j*)), he may, by Order (*k*), authorise

ADMINISTRATION. For the procedure in enforcing these penalties, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*l*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 1 (1) (a), (3), (5); and see p. 449, *ante*.

(*m*) *Ibid.*, s. 1 (1) (b), (5); and see p. 451, *ante*.

(*n*) *Ibid.*, ss. 1 (1) (c), (5), 3; and see p. 447, *ante*.

(*o*) *Ibid.*, ss. 1 (1) (d), (5), 7 (1), (2), (3); and see p. 450, *ante*.

(*p*) *Ibid.*, s. 6; and see p. 448, *ante*.

(*q*) *Ibid.*, s. 8; and see p. 452, *ante*.

(*r*) *Ibid.*, s. 9. And see p. 453, *ante*, for special penalties in cases where the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 38, Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 22, or Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 38, is in force.

(*s*) For penalty, see p. 531, *post*.

(*a*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 7 (1) (2) (3); and see p. 450, *ante*.

(*b*) *Ibid.*, s. 8; and see p. 452, *ante*.

(*c*) See p. 445, *ante*.

(*d*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 2 (2); and see p. 451, *ante*.

(*e*) For definition, see p. 441, *ante*.

(*f*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 2 (1), applying Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 91; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 2, and see pp. 447—450, *ante*.

(*g*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 2 (2); Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 2 (1); and see p. 451, *ante*.

(*h*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 91—111, 251—265; Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 6; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 2—15, 115—128; and see, generally, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*i*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 154.

(*j*) *Ibid.*, s. 153 (4). As to metropolitan local government, see title METROPOLIS.

(*k*) No Order under this section has yet been made.

an inspector to take, during the period mentioned in the Order, such steps as appear necessary or proper for enforcing those provisions (*l*). An inspector so authorised has, for this purpose, the same powers with respect to workshops and workplaces as he has with respect to factories (*m*); he may take the like proceedings for enforcing the provisions of the Acts or of the law relating to public health, or for punishing or remedying any default, as might be taken by the district council (*n*); and may recover from the district council all such expenses as he may incur and as are not recovered from any other person (*o*).

Power of inspector to require local authority to act.

1047. Where it appears to an inspector that any act, neglect or default in relation to any drain, water-closet, privy, ashpit, water supply, nuisance, or other matter in a factory or workshop is punishable or remediable under the law relating to public health, but not under the Acts, he must give notice in writing thereof to the district council (*n*) in whose district the factory or workshop is situated, and the district council must make such inquiry into the subject of the notice, and take such action thereon, as seems to them proper, and must inform the inspector of the proceedings taken in consequence of the notice (*p*). An inspector may, for the purposes of this provision, take with him into a factory or workshop a medical officer of health, inspector of nuisances, or other officer of the district council (*q*). The notice which the inspector may give may have reference, not only to some neglect or default in relation to existing sanitary accommodation, but also to an alleged insufficiency of such accommodation (*r*).

Default of local authority

Where notice of an act, neglect or default is so given, and proceedings are not taken within one month for punishing or remedying it, the inspector may take the same proceedings as the district council might have taken, and may recover from them all the expenses which he incurs and which are not recovered from any other person and have not been incurred in any unsuccessful proceedings (*s*). The inspector himself may give notice to the person concerned to remedy any such act, neglect or default: he is not confined to taking legal proceedings in respect of the neglect of an owner or occupier to comply with a notice given by the local authority (*t*). Such notice given by the inspector may, in cases where the Public Health Acts Amendment Act, 1890, Part III., is in force, be the subject of an appeal to a court of quarter sessions in manner provided by the Summary Jurisdiction Acts (*u*),

(*l*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 4 (1).
(*m*) For powers of inspectors, see p. 529, *post*.
(*n*) For local authorities included in the term, see p. 454, *ante*. For forms of notices, see Encyclopædia of Forms and Precedents, Vol. X., pp. 356, 357.
(*o*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 4 (2).
(*p*) *Ibid.*, s. 5 (1).
(*q*) *Ibid.*, s. 5 (2).
(*r*) *Tracey* v. *Pretty & Sons*, [1901] 1 K. B. 444, *per* Lord ALVERSTONE, C.J., at p. 453.
(*s*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 5.(3).
(*t*) *Tracey* v. *Pretty & Sons*, *supra*, *per* Lord ALVERSTONE, C.J., at p. 454.
(*u*) *Ibid.*, *per* Lord ALVERSTONE, C.J., at p. 455. The appeal would lie under the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 7, the

SECT. 1. General Provisions.

and, apparently, the validity of the requirements of such notice may then be considered (*w*).

SECT. 2.—*Special Provisions.*

SUB-SECT. 1.—*Cotton Cloth and other Humid Factories.*

Limits of humidity.

1048. In every cotton cloth factory—that is to say, in every room, shed or workshop or part thereof in which the weaving of cotton cloth is carried on (*a*), and in every textile factory (*b*) in which atmospheric humidity is artificially produced by steaming or other mechanical appliances and wherein regulations for dangerous trades (*c*) with respect to humidity are not in force (*d*)—the amount of moisture in the atmosphere must not at any time exceed the amount set out in the table appended to the Factory and Workshop Act, 1901 (*e*), and the temperature must not at any time be raised by any artificial means (except gas used for lighting purposes) above 70° F., except in so far as may be necessary in the process of giving humidity to the atmosphere (*f*). The fact that one of the wet-bulb thermometers in the factory gives a higher reading than that shown in the table for the temperature existing in the factory is evidence that the amount of moisture in the atmosphere exceeds the prescribed limit (*g*). In the case of cotton cloth factories the Secretary of State may by Order (*h*) repeal or vary the table and substitute any new or amended table therefor, but such new or amended table cannot come into operation until it has been laid before Parliament for forty days, and has not been disapproved of by either House (*i*); and, in the case of the other textile factories referred to above, he may, by special Order (*k*), modify that table (*l*).

Notice as to artificial humidity.

1049. The occupier of every cotton cloth factory in which atmospheric humidity is produced by artificial means (except gas used for lighting purposes only) (*m*), and of any other textile factory referred to in the preceding paragraph (*n*), must, at or before the time at which the artificial production of humidity is commenced, give notice thereof in writing to the chief inspector, to whom must be

inspector standing in the place of the local authority; and as to such appeals, generally, see title MAGISTRATES.

(*w*) *Tracey* v. *Pretty & Sons*, [1901] 1 K. B. 444, *per* Lord ALVERSTONE, C.J., at pp. 453, 455; and compare note (*f*), p. 453, *ante*.

(*a*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 90.

(*b*) For definition, see p. 436, *ante*.

(*c*) See, hereon, p. 479, *post*.

(*d*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 96.

(*e*) *Ibid.*, Sched. IV.

(*f*) *Ibid.*, s. 90 (1).

(*g*) *Ibid.*, s. 90 (2).

(*h*) No Order has yet been made under this provision, but see note (*k*), *infra*.

(*i*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 91.

(*k*) By an Order dated 24th December, 1898 [1898—No. 1114], a special table of maximum humidity has been substituted for the table in the Fourth Schedule (see note (*e*), *supra*) in factories where the spinning of merino, cashmere or wool by the "French" or "dry" process is carried on.

(*l*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 96.

(*m*) *Ibid.*, s. 93 (1).

(*n*) *Ibid.*, s. 96.

reported, by an inspector visiting the factory at least once in every three months, in the prescribed form, the results of his examination into the temperature, atmospheric humidity and quantity of fresh air in the factory (*o*). The occupier of the factory may give written notice at any time that he has ceased to produce humidity by artificial means, whereupon this provision ceases to apply (*p*).

Cleanliness of means by which humidity produced.

1050. The water used in cotton cloth factories for the purpose of producing humidity must either be taken from a public supply of drinking water or other source of pure water or must be effectively purified to the satisfaction of the inspector, all ducts for the introduction of humidified air being kept clean (*q*); and the pipes used for introducing steam into a cotton cloth factory wherein the temperature is 70° F. or over must, so far as they are within the shed, be as small in diameter and length as is reasonably practicable, and covered with non-conducting material so as to minimise the amount of heat thrown off (*r*).

Ventilation.

1051. In cotton cloth factories in which humidity is produced by artificial means (except gas used for lighting purposes only), the ventilation must be such that during working hours the proportion of carbonic acid in the air does not exceed nine volumes to every ten thousand volumes of air in any part of the factory (*s*).

Cloak room accommodation.

1052. In every such factory erected since 2nd February, 1898, an adequate cloak room or cloak rooms, duly ventilated and kept at a suitable temperature, must be provided for the use of all persons employed therein (*t*).

White-washing roofs.

1053. The outside of the roof of every such factory must be whitewashed before 31st May in each year, and the whitewash effectively maintained until 31st August. The inspector may, however, approve and certify some alternative method as equally satisfactory (*a*).

Thermometer.

1054. In every cotton cloth factory (*b*), and in every other textile factory (*c*), there must be provided, maintained and kept in correct working order, for the purpose of recording the humidity of the atmosphere and the temperature, two sets of standardised wet and dry bulb thermometers, one set being fixed in the centre and one at the side of the factory or in such other position as the inspector may sanction or direct, so as to be plainly visible to the workers. The occupier or manager or person for the time being in

(*o*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 93 (2).
(*p*) *Ibid.*, s. 93 (3).
(*q*) *Ibid.*, s. 94 (1). This provision does not apply to other humid factories (*ibid.*, s. 96).
(*r*) *Ibid*, s. 94 (2) (not applicable to other humid factories (*ibid.*, s. 96)).
(*s*) *Ibid.*, s. 94 (3). As to the incidence of the cost of providing the means of ventilation, see p. 451, *ante*. The provision does not apply to other humid factories (*ibid.*, s. 96).
(*t*) *Ibid.*, s. 94 (5) (not applicable to other humid factories (*ibid.*, s. 96)).
(*a*) *Ibid.*, s. 94 (4). The provision does not apply to other humid factories (*ibid.*, s. 96).
(*b*) *Ibid.*, s. 92 (1).
(*c*) See p. 436, *ante*.

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charge of the factory must, except in the case of cotton spinning mills (*d*), read the thermometers daily, when any workers are employed, between 10 a.m. and 11 a.m., and between 3 p.m. and 4 p.m., and also, in the case of cotton cloth factories (*e*), between 7 a.m. and 8 a.m., recording the readings at each of those times on the prescribed form (*f*), which form is to be kept hung up near the thermometers and forwarded, duly filled up, at the end of each month to the inspector of the district, a copy being kept at the factory for reference (*g*). Each form is *primâ facie* evidence of the humidity of the atmosphere and temperature in the factory (*h*). A copy of the Humidity Table (*i*) must also be kept, properly framed and glazed, in a conspicuous position near each set of thermometers (*k*).

Records.

Penalties.

1055. If there is a contravention of any of the foregoing provisions with respect to cotton cloth and other humid factories, and such contravention is continued or not remedied or is repeated within twelve months after notice in writing has been given by the inspector to the occupier of the factory, such occupier is liable, for the first offence, to a fine of not less than £5 or not more than £10, and, for every subsequent offence, of not less than £10 or not more than £20 (*l*).

SUB-SECT. 2.—*Bakehouses.*

Conditions under which bakehouses are lawful.

1056. It is unlawful to let or suffer to be occupied or to occupy any room or place as a bakehouse (*m*), unless the following regulations are complied with (*n*).

There must be no water-closet, earth-closet, privy or ashpit within or communicating directly with it, and no drain or pipe for carrying off sewage matter may have any opening within the bakehouse. Every cistern for supplying water to it must be separate and distinct from any cistern for supplying water to a water-closet.

Penalties.

The penalty for non-compliance is a fine not exceeding 40*s.*, and a further fine not exceeding 5*s.* a day during contravention after conviction (*o*).

Painting or limewashing.

1057. All the inside walls, ceilings or tops of the rooms of a bakehouse (whether plastered or not), and all the passages and

(*d*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 96.
(*e*) Other humid factories are excepted (*ibid.*, s. 96).
(*f*) For this form, see Sched. IV., *ibid.*
(*g*) *Ibid.*, s. 92 (2) (b), (c).
(*h*) *Ibid.*, s. 92 (2) (e).
(*i*) See Sched. IV., *ibid.*, and p. 456, *ante*.
(*k*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 92 (2) (d).
(*l*) *Ibid.*, ss. 95, 96. As to the recovery of fines, see p. 535, *post*. Justices are not empowered by the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 4, to reduce the fine for a first offence below £5 (*Osborn* v. *Wood Brothers*, [1897] 1 Q. B. 197).
(*m*) For definition, see p. 440, *ante*.
(*n*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 97. For the special order as to the proportion of cubic feet of space per person to be provided in certain bakehouses, see note (*c*), p. 448, *ante*.
(*o*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22). As to the recovery of fines, see p. 535, *post*.

staircases, must either be painted with oil or be varnished or limewashed or be partly painted or varnished and partly limewashed. If painted with oil or varnished, there must be three coats of paint or varnish, which must be renewed at least once in seven years and washed with hot water and soap at least once in six months. If limewashed, the limewashing must be renewed at least once in six months (*p*).

Separation from sleeping places.

1058. A place on the same level with a bakehouse and forming part of the same building must not be used as a sleeping place, unless it is effectually separated from the bakehouse by a partition extending from floor to ceiling, and has an external glazed window of an area of at least 9 superficial feet, of which at least 4½ feet are made to open for ventilation (*q*). The penalty is 20*s.* for the first and £5 for any subsequent offence (*r*).

Insanitary bakehouses.

1059. The occupier of a room or place used as a bakehouse is liable to a fine not exceeding 40*s.* for the first offence, and £5 for any subsequent offence, if a factory inspector (*a*) or a district council (*b*) can satisfy a court of summary jurisdiction that such room or place is, on sanitary grounds, unfit for use or occupation as a bakehouse (*c*). In addition to or instead of inflicting a fine, the court may order the occupier to adopt means, within a time stated, for removing the ground of complaint. If, after the expiration of the time so limited or by a subsequent order enlarged, the order is not complied with, the occupier is liable to a fine not exceeding £1 for each day of non-compliance (*d*).

Underground bakehouses.

1060. No underground bakehouse (that is to say, no bakehouse any baking room (*e*) of which is so situate that the surface of the floor is more than 3 feet below the surface of the footway of the adjoining street or of the ground adjoining or nearest to the room (*f*)) may be used as a bakehouse (*g*), unless it was so used on the 17th August, 1901 (*h*). Whether a place is so used is a question of fact (*i*). Premises formerly used as a bakehouse, but temporarily without a tenant, are being so used if the landlord is trying to let them for that purpose (*k*).

Underground bakehouses used on the 17th August, 1901, can only

(*p*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 99. A bakehouse where these provisions are contravened will be deemed not to be kept in conformity with that Act (*ibid.*, s. 99 (2)). As to penalty, see p. 531, *post*.

(*q*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 100.

(*r*) *Ibid.* As to the recovery of fines, see p. 535, *post*.

(*a*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 118 (8).

(*b*) For the meaning of this expression see p. 454, *ante*.

(*c*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 98.

(*d*) *Ibid.* As to the recovery of fines, see p. 535, *post*.

(*e*) *I.e.*, any room used for baking or any purpose incidental thereto (Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 101 (3)).

(*f*) *Ibid.*

(*g*) For definition, see p. 440, *ante*.

(*h*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 101 (1). A place used in contravention of these provisions will be deemed a workshop not kept in conformity with that Act (*ibid.*, s. 101 (6)). As to penalty, see p. 531, *post*.

(*i*) *Schwerzerhof* v. *Wilkins*, [1898] 1 Q. B. 640, *per* WRIGHT, J., at p. 642.

(*k*) *Ibid.*

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continue to be so used if certified by the district council (*l*) to be suitable for that purpose (*m*) as regards construction, light, and ventilation, and in all other respects (*n*). The occupier may, within twenty-one days from the refusal of such certificate, apply to a court of summary jurisdiction, who may grant the certificate if it appears to the court that the bakehouse is suitable in the above respects (*o*).

Where any place has been let as a bakehouse, and such certificate cannot be obtained unless structural alterations are made, and the occupier alleges that the expenses of the alterations or part of them ought to be borne by the owner, the occupier may apply to a court of summary jurisdiction, who may make such order concerning the expenses or their apportionment as appears to be just and equitable in the circumstances, having regard to the terms of any contract between the parties (*p*); or in the alternative, at the request of the occupier, the court may determine the lease (*q*). The court of summary jurisdiction is the statutory tribunal for the decision of the question, and there is no jurisdiction in the High Court to entertain an action for determining such a dispute (*r*).

Retail bakehouses.

1061. In respect of retail bakehouses (that is to say, bakehouses or places (not being factories (*s*)), the bread, biscuits, or confectionery baked in which are sold, not wholesale, but by retail, in some shop or place occupied therewith), the district council (*t*), or council of a county borough (*a*), and in London the Court of Common Council and the metropolitan borough councils (*b*), are to enforce the above

(*l*) See p. 454, *ante*, and note (*b*), *infra*,. By the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 101 (5), London underground bakehouses, which are workshops, are specifically placed under the control of the Court of Common Council and the metropolitan borough councils.

(*m*) *Ibid.*, s. 101 (2); and *Evans* v. *Gallon & Son* (1904), 68 J. P. 537.

(*n*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 101 (4). For penalty, see note (*h*), p. 459, *ante*; and for a form of such certificate, see Encyclopædia of Forms and Precedents, Vol. X., p. 370.

(*o*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 101 (7).

(*p*) "I think that the apportionment is to be such as is just and equitable under all the circumstances of the case, of which the contractual relations between the parties form part only" (*Stuckey* v. *Hooke*, [1906] 2 K. B. 20, C. A., *per* FLETCHER MOULTON, L.J., at p. 25). Compare the similar provisions as to the expenses of ventilation, p. 451, *ante*, and of providing means of escape from fire, at p. 469, *post*.

(*q*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 101 (8).

(*r*) *Stuckey* v. *Hooke*, *supra*, following *Horner* v. *Franklin*, [1905] 1 K. B. 479, C. A., as to which see p. 469, *post*. It is doubtful whether the expenses of structural alterations for the purpose of obtaining a certificate are "impositions and outgoings" within the terms of a covenant in a lease that the lessee should pay "all impositions and outgoings for the time being payable either by landlord or tenant in respect of the premises." In *Goldstein* v. *Hollingsworth*, [1904] 2 K. B. 578, and *Morris* v. *Beal*, [1904] 2 K. B. 585, it was held that the expenses of structural alterations were within such a covenant. These decisions were, however, questioned by FLETCHER MOULTON, L.J., in *Stuckey* v. *Hooke*, *supra*, at p. 26; and in *Horner* v. *Franklin*, *supra*, ROMER, L.J., at p. 489, "reserved the right to consider the grounds on which those cases were decided"; but compare VAUGHAN WILLIAMS, L.J., in *Stuckey* v. *Hooke*, *supra*, at p. 24. As to the effect of such covenants generally, see title LANDLORD AND TENANT.

(*s*) For definition, see p. 436, *ante*.

(*t*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 102.

(*a*) *Ibid.*; and see s. 154.

(*b*) *Ibid.*; and see s. 153. In the metropolis these authorities also enforce

provisions as to bakehouses, and, for this purpose, the medical officers of health of those bodies have all the powers of a factory inspector in regard to entry, inspection, taking legal proceedings, and otherwise (*c*).

SUB-SECT. 3.—*Laundries.*

Temperature. Ventilation. Drainage.

1062. In every laundry (*d*) a fan or other efficient means must, if mechanical power (*e*) is used, be provided, maintained, and used for regulating the temperature in every ironing room, and for carrying away the steam in every washhouse (*f*); all stoves for heating irons must be sufficiently separated from any ironing room or ironing table; and gas irons emitting noxious fumes must not be used; the floors must also be kept in good condition and so drained as to allow the water to flow off freely (*g*).

SUB-SECT. 4.—*Home Work.*

Restrictions.

1063. If a place in which work is carried on for the purpose of or in connection with the business of a factory or workshop is dangerous or injurious to the health of the persons employed therein, the district council may give notice in writing (*h*) to the occupier of such factory or workshop, or to any contractor employed by him, and such occupier or contractor will be liable to a fine not exceeding £10 (*i*), if, after one month from receipt of the notice, he gives out work to be done in that place, and the court finds such place to be injurious or dangerous as aforesaid (*k*). This provision applies to places from which any work is given out as if they were workshops (*l*); but it applies only to such classes of work as the Secretary of State may specify by special Order (*m*).

the provisions as to underground bakehouses which are workshops (Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 101 (5), and Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 26.

(*c*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 102. As to the powers of an inspector, see p. 529, *post.*

(*d*) Factory and Workshop Act, 1907 (7 Edw. 7, c. 39), s. 3. As to the term "laundry," see p. 437, *ante.*

(*e*) See note (*h*), p. 436, *ante.*

(*f*) As to the general requirements in regard to temperature and ventilation in factories and workshops, which have also to be observed, see pp. 448, 450, *ante.*

(*g*) Compare p. 452, *ante.* Offences under this provision are punishable under the Factory and Workshop Acts and not under the Public Health Acts, even though the laundry is a workshop (Factory and Workshop Act, 1907 (7 Edw. 7, c. 39), s. 3). In case of contravention the laundry will be deemed a factory or workshop not kept in conformity with the Acts (*ibid.*). As to penalty, see p. 531, *post.*

(*h*) For a form of notice, see Encyclopædia of Forms and Precedents, Vol. X., p. 372. As to "district council," see p. 454, *ante.*

(*i*) As to the recovery of fines, see p. 535, *post.*

(*k*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 108 (1).

(*l*) *Ibid.*, s. 108 (2).

(*m*) *Ibid.*, s. 108 (3). The following classes of work have been specified:—The making, cleaning, washing, altering, ornamenting, finishing, and repairing of wearing apparel; the making, ornamenting, mending, and finishing of lace, lace curtains, and nets; the making or repairing of umbrellas, sunshades, parasols, or parts thereof, and sacks; the carding, boxing, or packeting of buttons, hooks and eyes, pins, and hair pins; fur-pulling, pea picking, feather sorting, cabinet and furniture making and upholstery work, and the covering

SECT. 2. Special Provisions.

Work done in infected premises.

1064. If the occupier of a factory or workshop or of any place from which any work is given out, or any contractor employed by him, causes or allows wearing apparel to be made, cleaned, or repaired in any dwelling-house or building occupied therewith whilst any inmate thereof is suffering from scarlet fever or small-pox, then, unless he proves that he was not aware of the existence of the illness and could not reasonably have been expected to become aware of it, he is liable to a fine not exceeding £10 (*n*).

Powers in case of infectious diseases.

1065. If any inmate of a house is suffering from an infectious disease required by law to be notified (*o*), the district council (*p*) may make an order forbidding the making, cleaning, washing, altering, ornamenting, finishing and repairing of wearing apparel, and any work incidental thereto, (and such other classes of work as may be specified by special Order (*q*) of the Secretary of State), to be given out to any person living or working in that house, or such part thereof as may be specified in the Order (*r*). The Order may be made notwithstanding that the diseased person may have been removed from the house; and is to be made either for a specified time or subject to the condition that the house or part thereof liable to be infected shall be disinfected to the satisfaction of the medical officer of health or that other reasonable precautions shall be adopted (*s*). Such Order may be served on the occupier of any factory or workshop or of any other place from which work is given out, or on the contractor employed by such occcupier (*t*). The

of racquet or tennis balls; the making of electro-plate, files, locks, latches, keys, artificial flowers, tents, paper bags, brushes, stuffed toys, baskets, cart gear (including swivels, rings, loops, gear buckles, mullin bits, hooks, and attachments of all kinds), nets (other than wire nets), boxes or other receptacles or parts thereof made wholly or partially of paper, cardboard, chip, or similar material, and iron and steel chains, cables, anchors, and grapnels; or any processes incidental to the above (Order of May 23rd, 1907 [1907—No. 408]).

(*n*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 109. As to the recovery of fines, see p. 535, *post*.

(*o*) See Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), s. 6, which defines the diseases to be notified to be: small-pox, cholera, diphtheria, membranous croup, erysipelas, scarlatina or scarlet fever, and typhus, typhoid, enteric, relapsing, continued and puerperal fever. By s. 7, *ibid.*, the local authority may include other infectious diseases, subject to the approval of the Local Government Board; and see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*p*) As to definition of "district council," see p. 454, *ante*. In the event of urgency the powers conferred upon the district council may be exercised by any two or more members of the council acting on the advice of the medical officer of health (Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 110 (3)). For a form of order, see Encyclopædia of Forms and Precedents, Vol. X., p. 374.

(*q*) By the Home Work Order of May 23rd, 1907 [1907—No. 408], the classes of work thus forbidden to be given out are those set out in note (*m*), p. 461, *ante*, except cabinet and furniture making, and the making of electro-plate, files, locks, latches, keys, cart gear, and iron and steel chains, cables, anchors, and grapnels.

(*r*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 110 (1) (5). For a form of order, see Encyclopædia of Forms and Precedents, Vol. X., p. 373.

(*s*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 110 (2). For the general law as to precautions against infectious diseases, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*t*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 110 (1).

penalty for contravention of the provisions of the Order is a fine not exceeding £10 (*a*).

Lists of outworkers.

1066. If persons are employed in such classes of work as the Secretary of State may by special Order specify (*b*), the occupier of every factory and workshop, and every contractor employed by him in the business of the factory or workshop, is required to keep in the prescribed form and manner, and with the prescribed particulars (*c*), lists showing the names and addresses of all persons directly employed by him, either as workmen or as contractors, in the business of the factory or workshop, outside the factory or workshop, and the places where they are employed (*d*), and to send to an inspector such copies of or extracts from such lists as the latter may require (*d*). Copies of the lists are also to be sent to the district council on or before 1st February and 1st August in each year (*d*).

The district council (*e*) must cause these lists to be examined, and must furnish the name and place of employment of every outworker included therein whose place of employment is outside its district to the council of the district in which such place of employment is (*f*).

The lists kept by the occupier or contractor must be open to inspection by any inspector and by any duly authorised officer of the district council, and the copies sent to the council, and the particulars furnished by one council to another, must be open to inspection by any inspector (*g*).

These provisions as to lists of outworkers apply to any place from which any work is given out and to the occupier thereof, and to any contractor employed by him in connection with such work, as if that place were a workshop (*h*); and the penalty for contravention is a fine not exceeding 40*s*., and for a second or subsequent offence, £5 (*i*).

SUB-SECT. 5.—*Shops.*

Seats in shops.

1067. In all rooms of a shop or other premises where goods are actually retailed to the public, and where female assistants are employed in such retailing, the employer is to provide behind the counter, or in some other suitable position, not less than one seat to every three female assistants employed in each room (*k*) under a penalty not exceeding £3 for a first offence, and not less than £1, nor more than £5, for a second or subsequent offence (*l*).

(*a*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 110 (4). As to the recovery of fines, see p. 535, *post*.

(*b*) The classes of work are those included in note (*m*), p. 461, *ante* (Order of May 23rd, 1907 [1907—No. 408]).

(*c*) The form and manner of, and the particulars to be included in, lists of outworkers are set out in the schedule to the Order of May 23rd, 1907 [1907—No. 408].

(*d*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 107 (1).

(*e*) As to definition of "district council," see p. 454, *ante*.

(*f*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 107 (2). For a form of such a notice, see Encyclopædia of Forms and Precedents, Vol. X., p. 371.

(*g*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 107 (3).

(*h*) *Ibid.*, s. 107 (4).

(*i*) *Ibid.*, s. 107 (5).

(*k*) Seats for Shop Assistants Act, 1899 (62 & 63 Vict. c. 21), s. 1.

(*l*) *Ibid.*, s. 2. For provisions relating to the hours of employment in shops, see pp. 509 *et seq.*

Part III.—Provisions as to Accident and Nuisance.

SECT. 1.

SECT. 1.—*Provisions for securing Safety.*

SUB-SECT. 1.—*Fencing of Machinery.*

Provisions for securing Safety.

1068. In a factory, every hoist or teagle, and every fly-wheel directly connected with the steam or water or other mechanical power (*m*), whether in the engine-house or not, and every part of any water wheel or engine worked by any such power, must be securely fenced (*n*); and every wheel-race not otherwise secured must be securely fenced close to the edge of the wheel-race (*n*). This duty is absolute, and must be performed whether or not the machinery in question is in fact dangerous without fencing (*o*).

Where there is an absolute duty to fence.

Dangerous machinery.

All dangerous parts of the machinery (*p*) in a factory, and every part of the mill gearing (*q*), must either be securely fenced or be in such position or of such construction as to be as safe to every person employed or working in the factory as if it were so fenced (*r*). This requirement is general, and is not limited to the machinery supplying motive power to other machinery (*s*); nor is it confined to machinery which is in itself dangerous in the course of careful working (*t*). Whether or not any part of machinery is dangerous is a question of fact and degree to be decided by the court (*a*). To fence in the manner usual in the best regulated factories in the locality is not necessarily a sufficient compliance with this provision (*b*).

Maintenance of fencing.

1069. All fencing must be constantly maintained in an efficient state while the parts required to be fenced are in motion or use, except where they are under repair or under examination in connection with repair, or are necessarily exposed for the purpose of cleaning or lubricating or altering the gearing or arrangements of the parts of the machine (*c*).

(*m*) See notes (*g*) and (*h*), p. 436, *ante*.

(*n*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 10 (1). The provision does not apply to machinery in a place which is no part of an existing factory, although within the close, curtilage, and precincts of a factory (*Lewis* v. *Gilbertson & Co., Ltd.* (1904), 91 L. T. 377; and see p. 443, *ante*).

(*o*) *Doel* v. *Sheppard* (1856), 5 E. & B. 856.

(*p*) For definition, see p. 446, *ante*.

(*q*) For definition, see p. 446, *ante*.

(*r*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 10 (1).

(*s*) *Redgrave* v. *Lloyd & Sons, Ltd.*, [1895] 1 Q. B. 876, where the magistrate, without determining whether or not a press worked by steam power was dangerous, had held that the part of the press where the accident happened was not dangerous machinery requiring to be fenced. The magistrate "ought to have inquired whether the part of the machinery at which the accident happened was a part of the machinery which was dangerous" (*ibid.*, *per* CAVE, J., at pp. 879, 880).

(*t*) *Hindle* v. *Birtwistle*, [1897] 1 Q. B. 192.

(*a*) *Ibid.*, *per* WILLS, J., at p. 195.

(*b*) *Schofield* v. *Schunck* (1855), 24 L. T. (o. s.) 253.

(*c*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 10 (1). In case of contravention the factory will be deemed not kept in conformity with the Acts

SUB-SECT. 2.—*Self-acting Machines.*

SECT. 1. Provisions for securing Safety.

1070. In a factory erected on or since 1st January, 1896, the traversing carriage of any self-acting machine must not be allowed to run out within a distance of 18 inches from any fixed structure not being part of the machine, if the space over which it runs out is a space over which any person is liable to pass, whether in the course of his employment or otherwise; but nothing in this provision is to prevent any portion of the traversing carriage of any self-acting cotton spinning or woollen spinning machine being allowed to run out within a distance of 12 inches from any part of the head stock of another self-acting cotton spinning or woollen spinning machine (*d*). "Running-out spaces."

1071. A person employed in a factory must not be allowed to be in the space between the fixed and traversing parts of a self-acting machine unless the machine is stopped with the traversing part on the outward run, but the space in front of a self-acting machine is not to be included in the space aforesaid (*e*). If a person is in the above-mentioned space in such circumstances that the person in charge of the machine believes the former not to be in such space, the former is not regarded as being allowed there, for the words "must not be allowed" do not mean "shall be prevented" (*f*). The provision is not confined to acts allowed by the occupier himself, but extends to acts permitted by his servant or agent (*g*). Restrictions as to allowing persons about machinery.

A woman (*h*), young person (*i*), or child (*k*) must not be allowed to work between the fixed and traversing part of any self-acting machine while the machine is in motion by the action of steam, water or other mechanical power (*l*).

SUB-SECT. 3.—*Grinding in Tenement Factories.*

1072. Where grinding is carried on in a tenement factory (*m*) (not being a textile factory (*n*)), drum-boards to fence the shafting and pulleys and belt guards must be provided, hand rails must be fixed over the drums, and the whole kept in proper repair. Floors Requirements.

(*ibid.*, s. 10 (2)). As to penalty, see p. 531, *post*; see also *Verney* v. *Fletcher* (*Mark*) *& Sons, Ltd.*, [1909] 1 K. B. 444; *Scott* v. *Brookfield Linen Co., Ltd.*, [1910] 2 I. R. 509. For the remedy of a workman injured by his master's neglect to carry out these provisions, see note (*h*), p. 531, *post*; and titles MASTER AND SERVANT; NEGLIGENCE.

(*d*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 12 (1). For contravention the factory will be deemed not kept in conformity with the Act (*ibid.*, s. 12 (4)). As to penalty, see p. 531, *post*.

(*e*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 12 (2). A person allowed to be in this space or to work in contravention of this section is deemed to be employed contrary to the Acts (*ibid.*, s. 12 (4)).

(*f*) *Crabtree* v. *Fern Spinning Co., Ltd.* (1902), 85 L. T. 549.

(*g*) *Ibid.*, *per* Lord ALVERSTONE, C.J., at p. 551.

(*h*) For definition, see p. 445, *ante*.

(*i*) For definition, see p. 445, *ante*.

(*k*) For definition, see p. 445, *ante*.

(*l*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 12 (3). For meaning of "steam, water or other mechanical power," see notes (*g*) and (*h*), p. 436, *ante*. For penalty for employment contrary to the Act, see p. 533, *post*.

(*m*) For definition, see p. 441, *ante*.

(*n*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 88 (5). For definition, see p. 436, *ante*.

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constructed on or since 1st January, 1896, must be so constructed and maintained as to facilitate the removal of slush, and all necessary conveniences provided to facilitate such removal; and every grinding room or hull established on or after the same date must be so constructed that, for light grinding, there shall be a clear space of 3 feet at least between each pair of troughs, and for heavy grinding a clear space of 4 feet at least between each pair of troughs, and 6 feet at least in front of each trough; while the sides of all drums in such grinding room or hull must be closely fenced. A grindstone erected on or after the same date must not be run before any door or other entrance, nor, except in pursuance of a special exemption granted by the Secretary of State (*o*), may one grindstone be run before any fire-place or in front of another. The owner of the factory is responsible for the observation of these regulations (*p*).

It is the duty of the owner and occupier respectively of such a factory to see that such part of the horsing chains and of the hooks to which the chains are attached as are supplied by them are kept in efficient condition (*q*).

Cutlery grinding.

1073. In every such factory where grinding of cutlery is carried on the owner must provide that there shall at all times be instantaneous communication between each of the rooms in which the work is carried on and both the engine-room and the boiler-house (*r*).

SUB-SECT. 4.—*Cleaning Machinery in Motion.*

Prohibition in case of child.

1074. A child (*s*) must not be allowed to clean in any factory any part of any machinery (*t*), or any place under any machinery other than overhead mill gearing (*a*), while the machinery is in motion by the aid of steam, water or other mechanical power (*b*).

Young person.

A young person (*c*) must not be allowed to clean any dangerous part of the machinery in a factory while the machinery (*t*) is in motion by the aid of steam, water, or other mechanical power; and for this purpose such parts of the machinery are, unless the contrary is proved, presumed to be dangerous as are so notified by a factory inspector (*d*) to the occupier of the factory (*e*).

(*o*) By Order dated 25th October, 1897 [1897—No. 796], this exemption is applied to the running of any grindstone in front of bolster stones used by table-blade grinders, and humping and shank stones used by scissors grinders.

(*p*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 88 (1), and Sched. III. As to other matters in respect of which the owner of a tenement factory is responsible instead of the occupier, see p. 532, *post*. For definition of "owner," see p. 447, *ante*.

(*q*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 88 (2).

(*r*) *Ibid.*, s. 88 (3). For penalty, see *ibid.*, s. 88 (4), and note (*d*), p. 465, *ante*.

(*s*) For definition, see p. 445, *ante*.

(*t*) For definition, see p. 446, *ante*.

(*a*) For definition, see p. 446, *ante*.

(*b*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 13 (1). For the meaning of "steam, water or other mechanical power," see notes (*g*) and (*h*), p 436, *ante*.

(*c*) For definition, see p. 445, *ante*.

(*d*) See Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 118 (8); and p. 529, *post*.

(*e*) *Ibid.*, s. 13 (2).

A woman (*f*) or young person (*g*) must not be allowed to clean the mill-gearing (*h*) in a factory while it is in motion for the purpose of propelling any part of the manufacturing machinery (*i*).

Woman or young person.

The prohibition extends to the cleaning of the fixed parts of the machinery, and is not confined to the moving parts thereof (*k*).

SUB-SECT. 5.—*Steam Boilers.*

Steam boilers.

1075. Every steam boiler used for generating steam in a factory or workshop or in any place to which any of the provisions of the Acts (*l*) apply, must, whether separate or one of a range, have attached to it a proper safety valve and a proper steam gauge and water gauge to show the pressure of steam and the height of water in the boiler, and must be examined thoroughly by a competent person at least once in each fourteen months (*m*). The boiler, valve, and gauges must be maintained in proper condition (*n*). A report of the result of each examination must, in the prescribed form, be entered in or attached to the general register (*o*) of the factory or workshop within fourteen days, and must be signed by the person making the examination, and, if that person is an inspector of a boiler-inspecting company or association, by the chief engineer of the company or association (*p*).

This provision does not apply to the boiler of any locomotive (*q*) belonging to or used by a railway company, or to any boiler belonging to or exclusively used in His Majesty's service (*r*). For the purposes of this provision the whole of a tenement factory or workshop (*s*) is deemed to be one factory or workshop, and the owner, who is in this case substituted for the occupier (*t*), is to register the above-mentioned report (*u*).

SUB-SECT. 6.—*Means of Escape from Fire.*

Factories not commenced before 1892 and workshops not before 1896.

1076. Every factory of which the construction was not commenced on or before 1st January, 1892, and in which more than forty

(*f*) For definition, see p. 445, *ante*.
(*g*) For definition, see p. 445, *ante*.
(*h*) For definition, see p. 446, *ante*.
(*i*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 13 (3). A woman, young person, or child allowed to clean in contravention of this section is deemed to be employed contrary to the provisions of the Acts (*ibid.*, s. 13 (4)). For penalty for employment contrary to these provisions, see p. 533, *post*.
(*k*) *Pearson* v. *Belgian Mills Co.*, [1896] 1 Q. B. 244, per KAY, L.J., at p. 246; see also *Taylor* v. *Mark Dawson & Son., Ltd.* (1910), 130 L. T. Jo. 10 (removing fluff from machinery, such fluff being saleable, is still cleaning machinery).
(*l*) See p. 441, *ante*.
(*m*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 11 (1).
(*n*) *Ibid.*, s. 11 (2). As to boiler explosions, see p. 474, *post*.
(*o*) See p. 525, *post*.
(*p*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 11 (3). In case of contravention the factory or workshop will be deemed not kept in conformity with the Acts (*ibid.*, s. 11 (4)); as to penalty, see p. 531, *post*.
(*q*) See *Murphy* v. *Wilson & Son* (1883), 48 L. T. 788, for a decision (under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42)), as to the meaning of the word "locomotive engine."
(*r*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 11 (5).
(*s*) See pp. 441, 442, *ante*.
(*t*) Compare p. 532, *post*.
(*u*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 11 (6).

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persons are employed (*v*), and every workshop of which the construction was not commenced before 1st January, 1896 and in which more than forty persons are employed, must be furnished with a certificate from the district council (*a*), or, in London, from the London County Council (*b*), that the factory or workshop is provided with such means of escape in case of fire for the persons employed therein as can reasonably be required in the circumstances of each case (*c*). The means of escape so provided must be maintained in good condition and free from obstruction (*d*).

Certificate to be given.

The above-mentioned councils must examine each factory and workshop within their respective districts, and, on being satisfied as to the means of escape, give a certificate to that effect (*e*).

Factories before 1892 and workshops before 1896.

1077. With respect to factories the construction of which was commenced before 1st January, 1892, and workshops the construction of which was commenced before 1st January, 1896, and in which more than forty persons are employed, it is the duty of the district council (*f*) of every district, and, in London, of the London County Council (*g*), from time to time to ascertain whether all such factories and workshops within their district are provided with such means of escape as aforesaid, and to serve on the owner of any factory or workshop not so provided (*h*) a notice (*i*) in writing specifying the measures necessary for such provision and requiring him to carry them out before a specified date; and thereupon the owner has power, notwithstanding any agreement with the occupier, to

(*v*) Separate houses connected by a gangway or bridge may constitute one factory within the meaning of this provision (*Re London County Council and Tubbs* (1903), 68 J. P. 29); see p. 444, *ante*.

(*a*) The term includes the council of a county borough (Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 154).

(*b*) *Ibid.*, s. 153 (1), where it is also provided that expenses incurred by the London County Council in executing this provision are to be defrayed as part of their expenses in the management of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.).

(*c*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 14 (1). In case of contravention the factory or workshop will be deemed not kept in conformity with the Acts (*ibid.*); as to the penalty, see p. 531, *post*.

(*d*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 14 (6). In case of contravention the factory or workshop will be deemed not kept in conformity with the Acts (*ibid.*)

(*e*) *Ibid.*, s. 14 (1). The certificate must specify in detail the means of escape provided (*ibid.*). For a form of such certificate, see Encyclopædia of Forms and Precedents, Vol. X., p. 363. All expenses incurred by a district council in the execution of these provisions are to be defrayed—(1) in the case of an urban district council, as part of their expenses of the general execution of the Public Health Act, 1875; and (2) in the case of a rural district council, as special expenses incurred in the execution of the Public Health Act, 1875; and such expenses are chargeable to the contributory place in which the factory or workshop is situated (Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 14 (8)). As to London, see note (*b*), *supra*. As to these expenses, see titles LOCAL GOVERNMENT; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*f*) See note (*a*), *supra*.

(*g*) See note (*b*), *supra*.

(*h*) See p. 447, *ante*. In factories and workshops other than those which are the subject of the above paragraph, and tenement factories or workshops, the usual rule, by which the occupier is liable (see p. 532, *post*) applies.

(*i*) For a form of such notice, see Encyclopædia of Forms and Precedents, Vol. X., p. 363.

take such steps as are necessary for compliance with the notice, and is liable to a penalty of £1 for every day of non-compliance (*j*). If several separate factories are in the same building and have a common owner, separate notices must be given in respect of each (*k*).

Interference with third parties.

An owner cannot, however, be required to carry out measures for providing means of escape from fire which involve interference with or trespass upon the rights of third parties occupying different parts of the same building in separate tenures (*l*).

Arbitrations.

1078. In case of difference of opinion between the owner and the council in respect of such provision of means of escape, the difference is to be referred to arbitration on the application, within one month after the difference arises, of either party (*m*), and the award is binding on the parties thereto, the notice of the council being discharged, amended, or confirmed in accordance therewith (*n*). The fact that a party is not present at the arbitration does not prevent him from being bound by the award (*o*). Separate awards are necessary in respect of separate factories, though in the same building (*p*).

Contribution or recoupment by occupier.

1079. If the owner (*q*) alleges that the occupier of the factory or workshop ought to bear or contribute to the expenses of complying with the requirements of the council, he must apply to the county court of the district, and that court, after hearing the occupier, may make such order as appears to it to be just and equitable in all the circumstances of the case (*r*). The county court has jurisdiction to apportion such expenses between owner and occupier, although the occupier has covenanted to pay all outgoings (*s*). The question is not determined by the terms of the tenancy alone (*a*), although the county court judge, when

(*j*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 14 (2). As to the recovery of penalties, see p. 535, *post*.

(*k*) *Toller* v. *Spiers and Pond, Ltd.*, [1903] 1 Ch. 362.

(*l*) *Re London County Council and Lewis* (1900), 82 L. T. 195; *Toller* v. *Spiers and Pond, Ltd., supra;* see also *Consolidated Properties Co.* v. *Chilvers* (1901), 18 T. L. R. 59; *London County Council* v. *Brass* (1901), 17 T. L. R. 504.

(*m*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 14 (3). For provisions as to arbitrations, see *ibid.*, Sched. I., and for the necessary forms in connection with such arbitrations, see Encyclopædia of Forms and Precedents, Vol. X., pp. 365 *et seq.*

(*n*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 14 (3).

(*o*) *Toller* v. *Spiers and Pond, Ltd., supra.*

(*p*) *Ibid.*

(*q*) See p. 447, *ante*.

(*r*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 14 (4); and see title COUNTY COURTS, Vol. VIII., p. 648. No proceedings in the High Court can be instituted for the recovery of contribution (*Horner* v. *Franklin*, [1905] 1 K. B. 479, C. A.). In the provision referred to "the word 'may' really means 'must'" (*ibid., per* VAUGHAN WILLIAMS, L.J., at p. 488). For decisions under similar provisions in respect of ventilation and underground bakehouses, see pp. 459, 460, *ante*. *Shephard* v. *Barber* (1902), 67 J. P. 238, must be regarded as overruled.

(*s*) *Monk* v. *Arnold*, [1902] 1 K. B. 761, approved in *Horner* v. *Franklin, supra.*

(*a*) *Horner* v. *Franklin, supra, per* ROMER, L.J., at p. 488. In *Arding*

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considering what is "just and equitable," is to take those terms into consideration (*b*).

Tenement factory. Powers of inspector.

1080. For the purposes of the foregoing provisions the whole of a tenement factory (*c*) or workshop (*d*) is deemed to be one factory or workshop, and the owner is substituted for the occupier (*e*); and a factory inspector (*f*) may give the like notice and take the like proceedings as in the case of matters punishable or remediable under the law relating to public health but not under the Acts (*g*).

Bye-laws for means of escape.

1081. Every district council (*h*) and, in the administrative county of London, the London County Council (*i*), in addition to any powers they possess with reference to the prevention of fire, have power to make bye-laws providing for means of escape from fire in the case of any factory or workshop (*k*). The power of the London County Council to make bye-laws with respect to the means of escape from fire in buildings exceeding 60 feet in height (*l*) extends to all factories or workshops, whether exceeding 60 feet in height or not (*m*).

SUB-SECT. 7.—*Construction of Doors.*

To open from inside.

1082. While any person employed in a factory or workshop (other than a men's workshop (*n*)) is within the factory or workshop for the purpose of employment or meals, the doors of the factory or

v. *Economic Printing and Publishing Co.* (1898), 79 L. T. 622, C. A., two covenants in a lease provided that the lessee should bear all "rates, taxes, and impositions" and outgoings whatsoever and "a fair share and proportion of all costs and expenses which the lessors . . . may be called upon to pay or contribute, or would be liable to, in or about every or any reparation . . . by virtue of any Act or Acts of Parliament." The owners brought an action against their tenants to recover the whole cost of structural alterations required by the local authority for the purpose of providing means of escape in case of fire. It was held that upon the construction of the lease the tenants were liable to pay only a fair share and proportion of the total cost; see also note (*r*), p. 460, *ante*, and title LANDLORD AND TENANT.

(*b*) *Horner* v. *Franklin*, [1905] 1 K. B. 479, C. A.

(*c*) For definition, see p. 441, *ante*.

(*d*) For definition, see p. 443, *ante*.

(*e*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 14 (7); and see p. 447, *ante*. Had the building in question in *Toller* v. *Spiers and Pond, Ltd.*, [1903] 1 Ch. 362, 371, been a tenement factory, the local authority could have insisted on the construction of the staircase (see note (*l*), p. 469, *ante*) which, the building being not of that character, they were held not entitled to require.

(*f*) See Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 118 (8).

(*g*) *Ibid.*, s. 14 (5); and see p. 454, *ante*. See also title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*h*) See note (*a*), p. 468, *ante*.

(*i*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 153 (2).

(*k*) *Ibid.*, s. 15: ss. 182—186 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), apply to any bye-laws so made. Model bye-laws under this section have been prepared by the Local Government Board after consultation with the Home Office. See, generally, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*l*) See London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 164. The London Building Acts (Amendment) Act, 1905 (5 Edw. 7, c. ccix.), makes further elaborate provisions as to protection from fire in the metropolis (see also title METROPOLIS); but as to its application to factories and workshops, see s. 26 of that Act.

(*m*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 153 (3).

(*n*) *Ibid.*, s. 157 (1). For definition, see p. 443, *ante*.

workshop, and of any room therein in which any such person is, must not be locked nor bolted nor fastened in such a manner that they cannot be easily and immediately opened from the inside (*o*).

In every factory or workshop (other than a men's workshop (*p*)) the construction of which was not commenced before 1st January, 1896, the doors of each room in which more than ten persons are employed must, except in the case of sliding doors, be constructed so as to open outwards (*q*).

When to open outwards.

SUB-SECT. 8.—*Summary Orders prohibiting Use of Dangerous Machinery or Unhealthy or Dangerous Factories or Workshops.*

1083. On complaint by a factory inspector, and on being satisfied that any part of the ways, works, machinery or plant (*r*) (including a steam boiler used for generating steam) used in a factory or workshop (other than a men's workshop (*s*)) is in such a condition that it cannot be used without danger to life or limb, a court of summary jurisdiction may, by order, prohibit the use of such part altogether, or until it is duly repaired or altered, under a penalty during contravention of the order not exceeding 40*s.* a day (*t*). Upon receiving evidence that the use of any such part of the ways, works, machinery or plant (*r*) involves imminent danger to life, the court or a justice may, upon an *ex parte* application by the factory inspector, make an interim order prohibiting, either absolutely or subject to conditions, the use thereof, until the earliest opportunity for hearing and determining the complaint (*u*).

As to dangerous machinery on complaint.

Upon *ex parte* application.

1084. On complaint by a factory inspector, and on being satisfied that any place used as a factory or workshop, or as part of a factory or workshop, is in such a condition that any manufacturing process or handicraft carried on therein cannot be so carried on without danger to health or to life or limb, a court of summary jurisdiction may, by order, prohibit the use of that place for the purpose of that process or handicraft, until such works have been executed as are, in the opinion of the court, necessary to remove the danger, under a penalty during contravention of the order not exceeding 40*s.* a day (*a*). In cases where proceedings might be taken by a district council under the law relating to public health, proceedings under the above provisions must not be taken unless the factory inspector is authorised to take proceedings under the Acts with

Unhealthy or dangerous factory or workshop.

(*o*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 16 (1). For penalty, see p. 531, *post*.

(*p*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22, s. 157 (1). For definition, see p. 443, *ante*.

(*q*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 16 (2). In case of contravention of this and the preceding provision the factory or workshop will be deemed not kept in conformity with the Acts (*ibid.*, s. 16 (3)). For penalty, see p. 531, *post*.

(*r*) The words "ways, works, machinery or plant" occur in the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1; see title MASTER AND SERVANT.

(*s*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 157 (1). For definition, see p. 443, *ante*.

(*t*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 17 (1), (3). This provision is applied to docks etc. (see p. 483, *post*), to certain buildings (see p. 485, *post*), also to certain railway lines and sidings (see p. 486, *post*).

(*u*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 17 (2).

(*a*) *Ibid.*, s. 18 (1), (3).

SECT. 1. Provisions for securing Safety.

respect to the enforcement of sanitary provisions in workshops or with respect to matters punishable or remediable under the law relating to public health, but not under the Acts (*b*).

In tenement factories the owner is substituted for the occupier as the person responsible for carrying out the above provisions (*c*).

SECT. 2.—*Notice and Investigation of Accidents.*

SUB-SECT. 1.—*In General.*

Notice of accidents.

1085. Where any accident (*d*) occurs in a factory or workshop (*e*) (other than a domestic factory or domestic workshop (*f*), or a quarry (*g*) any part of which is more than 20 feet deep (*h*)), which is either an accident causing loss of life to a person employed (*i*) in the factory or workshop; or an accident due to any machinery moved by mechanical power (*k*), or to molten metal, hot liquid, explosion, escape of gas or steam, or to electricity, or to any other special cause which the Secretary of State may specify by Order (*l*), and so disabling any person so employed as to cause him to be absent throughout at least one whole day from his ordinary work; or an accident disabling for more than seven days a person so employed from working at his ordinary work (*m*); written notice of the accident in the prescribed form and with the prescribed particulars must forthwith be sent to the factory inspector of the district; and also, except in the last class of accidents (and in the case of an accident the cause of which is specified by Order, if the Order so requires), to the certifying surgeon (*n*) of the district (*o*).

(*b*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 18 (2); and see p. 454, *ante*, and title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*c*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 87 (2).

(*d*) For the meaning of the term "accident" under the Workmen's Compensation Acts, see title MASTER AND SERVANT.

(*e*) The provisions as to accidents apply to docks etc. (see p. 483, *post*), certain buildings (see p. 485, *post*), and certain railway lines and sidings (see p. 486, *post*).

(*f*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 111 (4) (d). For definitions, see pp. 441, 442, *ante*.

(*g*) For definition, see p. 440, *ante*.

(*h*) Quarries Act, 1894 (57 & 58 Vict. c. 42), s. 3 (b), s. 31 of the Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16), being now s. 4 of the Notice of Accidents Act, 1906 (6 Edw. 7, c. 53).

(*i*) See p. 446, *ante*.

(*k*) See p. 436, *ante*.

(*l*) No Order under this provision is at present in force.

(*m*) The terms of this provision seem to cover such a case as *Lakeman* v. *Stephenson* (1868), L. R. 3 Q. B. 192, which arose under stat. (1844) 7 & 8 Vict. c. 15, s. 22 (now repealed), and which decided that if a person was unable to return to his ordinary work, although he did in fact return and attempt to work, such person was "prevented from returning to his work" within the meaning of the statute.

(*n*) See p. 530, *post*.

(*o*) Notice of Accidents Act, 1906 (6 Edw. 7, c. 53), s. 4 (1). The provisions of s. 4 of this Act are by *ibid.*, s. 4 (5), substituted for the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 19. Similar notice is required to be given in regard to certain diseases contracted in factories and workshops; see p. 476, *post*.

SECT. 2.
Notice and Investigation of Accidents.

If, after notification of an accident causing disablement, death results from the accident, notice in writing of the death must be sent to the factory inspector as soon as the death comes to the knowledge of the occupier of the factory or workshop (*p*).

Notice of death.

If the Secretary of State considers that, by reason of the risk of serious injury to persons employed, it is expedient that notice should be given in every case of any special class of explosion, fire, collapse of buildings, accidents to machinery or plant, or other occurrences in a factory or workshop, he may, by Order (*q*), extend the above provisions to any such class of occurrences, whether personal injury or disablement is caused or not (*r*). Such Order may allow notice to be given within a limited time instead of forthwith (*s*).

Extension to classes of dangerous occurrences.

1086. If any accident to which the above provisions apply occurs to a person employed in a factory or workshop the occupier of which is not the actual employer of the person killed or injured, the actual employer is to report the same immediately to the occupier, and in default is liable to a fine not exceeding £5 (*a*).

Notice by actual employer to occupier.

1087. In default of giving the notice required by these provisions, the occupier of the factory or workshop is liable to a fine not exceeding £10 (*b*).

Penalty.

1088. Where a certifying surgeon (*c*) receives notice of an accident (*d*) in a factory or workshop he must, with the least possible delay, proceed thither and fully investigate the nature and cause of the death or injury caused thereby, and within the next twenty-four hours send a report thereof to the inspector (*e*). For the purpose of such an investigation the certifying surgeon has the same powers as an inspector (*f*), and may enter any room to which the victim has been removed (*g*).

Investigation and report by certifying surgeon.

(*p*) Notice of Accidents Act, 1906 (6 Edw. 7, c. 53), s. 4 (2); and see title CORONERS, VOL. VIII., pp. 209 *et seq.*

(*q*) By Order dated 22nd December, 1906 [1906—No. 933], those provisions are extended to all cases of bursting of a revolving vessel, wheel, emery wheel, or grindstone moved by mechanical power; breaking of a rope, chain, or other appliance used in raising or lowering persons or goods by aid of mechanical power; and fire affecting any room in which persons are employed and causing complete suspension of ordinary work therein for not less than twenty-four hours.

(*r*) Notice of Accidents Act, 1906 (6 Edw. 7, c. 53), s. 5 (1).

(*s*) *Ibid.*, s. 5 (2).

(*a*) *Ibid.*, s. 4 (4).

(*b*) *Ibid.*, s. 4 (3). For further provisions as to notice of accidents in places other than factories and workshops, see the remaining sections of the Notice of Accidents Act, 1906 (6 Edw. 7, c. 53), and the Notice of Accidents Act, 1894 (57 & 58 Vict. c. 28); and titles CORONERS, Vol. VIII., pp. 209 *et seq.*; MINES, MINERALS AND QUARRIES; RAILWAYS AND CANALS; TRADE AND TRADE UNIONS. As to recording accidents in the general register, see p. 525, *post*, As to accidents arising out of explosions, see title EXPLOSIVES, p. 398, *ante*.

(*c*) See p. 530, *post*.

(*d*) See note (*d*), p. 472, *ante*.

(*e*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 20 (1).

(*f*) See *Ibid.*, s. 118 (8); and p. 529, *post*.

(*g*) *Ibid.*, s. 20 (2).

SECT. 2. Notice and Investigation of Accidents.

1089. Where a death has occurred by accident in a factory or workshop (other than a men's workshop (*h*)), special provisions are made for the conduct of the inquest (*i*).

Inquest.

Home Office investigation.

1090. Where it appears to the Secretary of State that a formal investigation of any accident (*k*) occurring in a factory or workshop is expedient, he may direct such an investigation to be held, and for that purpose may appoint a court consisting of a competent person and, if necessary, an assessor or assessors. The investigation is to be conducted in open court, and the court has all the powers of an inspector (*l*) and of a court of summary jurisdiction sitting to hear informations for offences under the Acts (*m*), together with powers of entry and inspection, of summoning witnesses, of requiring the production of documents, and of administering an oath (*n*). The court is to make a report to the Secretary of State, which may be made public (*n*).

SUB-SECT. 2—*Boiler Explosions.*

Notice to Board of Trade.

1091. Notice of every boiler explosion must, within twenty-four hours thereafter, be sent to the Board of Trade by the owner or user, or by the person acting on behalf of the owner or user, under penalty of a fine not exceeding £20 (*o*).

Definition of boiler.

The term "boiler" means any closed vessel used for generating steam, or for heating water, or for heating other liquids, or into which steam is admitted for heating, steaming, boiling, or other similar purposes (*p*); and "a closed vessel used for generating steam" means the whole machine in which the steam is made or produced, and where it is under pressure until it is allowed to go from that machine into something else for different purposes (*q*).

Exceptions.

This provision does not apply to any boiler used in His Majesty's

(*h*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 157 (1). For definition, see p. 443, *ante*.

(*i*) As to these, see Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 21; and title CORONERS, Vol. VIII., pp. 244, 259,

(*k*) See note (*d*), p. 472, *ante*.

(*l*) See Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 118 (8); and p. 529, *post*.

(*m*) See p. 535, *post*.

(*n*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 22, which contains detailed provisions for carrying out the investigation and the payment of the expenses thereof. The foregoing provisions as to accidents are applied to docks etc. (see p. 483, *post*), certain buildings (see p. 485, *post*), and certain railway lines and sidings (see p. 486, *post*). For the provisions relating to explosions other than boiler explosions, see title EXPLOSIVES, p. 400, *ante*.

(*o*) Boiler Explosions Act, 1882 (45 & 46 Vict. c. 22), s. 5 (1), (3). For the form and contents of such notice, see *ibid.*, s. 5 (2). That Act and the Boiler Explosions Act, 1890 (53 & 54 Vict. c. 35), are not confined to factories and workshops; see titles MINES, MINERALS AND QUARRIES; SHIPPING AND NAVIGATION. As to the recovery of fines, see Boiler Explosions Act, 1882 (45 & 46 Vict. c. 22), s. 8.

(*p*) *Ibid.*, s. 3.

(*q*) *R.* v. *Boiler Explosions Act*, 1882, *Commissioners*, [1891] 1 Q. B. 703, C. A., *per* Lord ESHER, M.R., at pp. 716, 717, where it was held that a steam-pipe laid from a boiler to a receiver, and thence to a pumping engine, was a boiler within the Act, and that it was a matter for inquiry under the Act when a valve which was attached to the pipe was blown off.

service nor to one used exclusively for domestic purposes (*r*). Whether a boiler is used exclusively for domestic purposes is a question of fact, the test being not the character of the persons using the boiler, nor whether they reside upon or occupy the premises containing it, but the use made of the boiler (*s*).

Preliminary inquiry. Formal investigation

1092. On receiving notice of a boiler explosion the Board of Trade may, if they think fit, direct a preliminary inquiry with respect to the explosion (*t*), and may, if it appears expedient, direct a formal investigation to be held, either upon or without a preliminary inquiry (*a*). The reports to be made to the Board of Trade in each inquiry or investigation are to be made public (*b*).

SECT. 3.—*Steam Whistles and Chimney Shafts.*

Steam whistles.

1093. No person may, without the sanction of the sanitary authority (*c*), use or employ in any manufactory, or any other place, any steam whistle (*d*) or steam trumpet for the purpose of summoning or dismissing workmen or persons employed under a penalty not exceeding £5 and a further daily penalty not exceeding 40*s*. Any such sanction may be revoked by the authority on giving a month's notice to the person concerned, and the sanction may be revoked by the Local Government Board upon representations made by any person that he is prejudicially affected thereby (*e*).

Chimney shafts.

1094. The local authority—that is to say, an urban sanitary authority, an urban district council, or a rural district council (*f*)—is empowered to make bye-laws with respect to the height of

(*r*) Boiler Explosions Act, 1882 (45 & 46 Vict. c. 22), s. 4; Boiler Explosions Act, 1890 (53 & 54 Vict. c. 35), s. 2.

(*s*) *Smith* v. *Müller*, [1894] 1 Q. B. 192, 195, where it was held that a boiler used for circulating hot water through offices in which the owner did not reside, and also for supplying hot water for cleaning the offices and for the caretaker's household use, was within the exception, as being "used exclusively for domestic purposes."

(*t*) Boiler Explosions Act, 1882 (45 & 46 Vict. c. 22), s. 6 (1). The inquiry is to be made by "one or more competent and independent engineer or engineers, practically conversant with the manufacture and working of boilers" (*ibid.*). For their powers, see *ibid.*, and *ibid.*, s. 6 (4); and see Boiler Explosions Act, 1890 (53 & 54 Vict. c. 35), s. 4. As to costs and expenses, see Boiler Explosions Act, 1882 (45 & 46 Vict. c. 22), s. 7.

(*a*) *Ibid.*, s. 6 (1). Such formal investigation is to be made at or near the place of the explosion "by a court consisting of not less than two commissioners appointed by the Board of Trade," one being an engineer specially acquainted with steam boilers (see note (*t*), *supra*), and one a competent lawyer (*ibid.*, s. 6 (2)). As to the powers of such a court, and as to costs and expenses, see note (*t*), *supra*.

(*b*) *Ibid.*, s. 6 (5).

(*c*) As to local authorities having the powers of sanitary authorities, see titles LOCAL GOVERNMENT; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*d*) A whistle in a factory which was at first blown by steam, but was afterwards disconnected from the boiler and blown by compressed air pumped by a gas engine, is a "steam whistle" within this provision (*Herbert* v. *Leigh Mills Co.* (1889), 53 J. P. 679).

(*e*) Steam Whistles Act, 1872 (35 & 36 Vict. c. 61), s. 2.

(*f*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 13. This provision does not extend to the administrative county of London.

SECT. 3. Steam Whistles and Chimney Shafts.

buildings and chimneys of buildings and with respect to the structure of chimney shafts for the furnaces of steam engines, breweries, distilleries, or manufactories (*g*).

Part IV.—Dangerous and Unhealthy Industries.

SECT. 1.—*Special Statutory Provisions.*

Notification of certain diseases.

1095. Every medical practitioner attending on or called in to visit a patient whom he believes to be suffering from lead, phosphorus, arsenical or mercurial poisoning, or anthrax, contracted in any factory or workshop, is required, under a penalty not exceeding 40*s.* (unless a notice has already been sent) to send forthwith to the chief inspector (*h*) a notice stating the patient's name and address and the disease from which, in his opinion, such patient is suffering (*i*).

To factory inspector and certifying surgeon.

1096. Written notice of every case of lead, phosphorus, arsenical or mercurial poisoning, or anthrax, occurring in a factory or workshop must forthwith be sent to the factory inspector and to the certifying surgeon for the district in like manner as if such case were an accident in respect of which notice is required to be sent (*k*).

The Secretary of State may, by special Order, apply the above provisions to any other disease occurring in a factory or workshop (*l*).

Ventilation in certain places.

1097. If, in a factory or workshop (other than a men's workshop (*m*)), there is carried on grinding, glazing, or polishing on a wheel or any process by which dust, gas, vapour, or other impurity is generated and inhaled by the workers to an injurious extent, and it appears to a factory inspector that such inhalations could be to a great extent prevented by the use of a fan or other mechanical means, the inspector may accordingly direct that a fan or other mechanical means of a proper construction be provided within a reasonable time (*n*). For the application of this provision

(*g*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 24. The provision is an extension of the power to make bye-laws given to local authorities by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 157. As to smoke nuisance and nuisance from alkali works, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*h*) Addressed to the Home Office, London (Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 73 (1), (2)). A fee of 2*s.* 6*d.* for each notice is payable to the medical practitioner as part of the expenses incurred by the Secretary of State (*ibid.*). For a form of notice, see Encyclopædia of Forms and Precedents, Vol. X., p. 369.

(*i*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 73.

(*k*) *I bid.*, s. 73 (3). As to notice of accidents, see p. 472, *ante*.

(*l*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 73 (4). No such Order is at present in force.

(*m*) *I bid.*, s. 157 (3).

(*n*) *I bid.*, s. 74. In case of contravention, the factory or workshop will be deemed not kept in conformity with the Acts (*ibid.*); as to penalty, see p. 531, *post*. For general provisions as to ventilation, see p. 450, *ante*.

it is not necessary that any worker should have suffered actual injury by inhaling impurities; the question is whether dust or other impurities are generated and inhaled to such an extent that the tendency is necessarily, in the long run, to injure the workers' health (*o*).

Lavatories and places for meals in certain trades.

1098. In every factory or workshop (other than a men's workshop (*p*)) where lead, arsenic, or any other poisonous substance is used, suitable washing conveniences must be provided for the persons employed in any department where such substances are used (*q*); and if those substances are so used as to give rise to dust or fumes, a person must not be allowed to take a meal nor to remain during the times allowed him for meals in any room in which any such substance is used, suitable provision being required to be made for enabling the persons employed in such rooms to take their meals elsewhere (*r*).

Restrictions as to employment in wet spinning.

1099. A woman (*s*), young person (*t*), or child (*a*) must not be employed in any part of a factory in which wet-spinning is carried on, unless sufficient means are employed and continued for protecting the workers from being wetted and, where hot water is used, for preventing the escape of steam into the room occupied by the workers (*b*).

Processes in which certain persons may not be employed.

1100. In the part of a factory or workshop in which is carried on the process of silvering of mirrors by the mercurial process or the process of making white lead, a young person or child must not be employed (*c*).

In the part of a factory in which the process of melting or annealing glass is carried on, a female young person or a child must not be employed (*d*).

In a factory or workshop in which is carried on the making or finishing of bricks (*e*) or tiles, not being ornamental tiles, or the making or finishing of salt, a girl under the age of sixteen must not be employed (*f*).

In the part of a factory or workshop in which is carried on any dry grinding in the metal trade or the dipping of lucifer matches, a child must not be employed (*g*).

(*o*) *Hoare* v. *Ritchie & Son*, [1901] 1 K. B. 434.

(*p*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 157 (3). For definition, see p. 443, *ante*.

(*q*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 75 (1).

(*r*) *Ibid.*, s. 75 (2). For penalty, see sub-s. 3; and note (*n*), p. 476, *ante*.

(*s*) For definition, see p. 445, *ante*.

(*t*) For definition, see p. 445, *ante*.

(*a*) For definition, see p. 445, *ante*.

(*b*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 76 (1). For penalty, see *ibid.*, sub-s. 2; and note (*n*), p. 476, *ante*.

(*c*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 77 (1). There are, in addition, special rules for the manufacture of white lead, as to which see p. 480, *post*.

(*d*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 77 (2).

(*e*) For the meaning of the term "finishing of bricks," see *Squire* v. *Stanley Brothers* (1901), 84 L. T. 535, *per* Lord ALVERSTONE, C.J., at p. 536.

(*f*) Factory and Workshop Act, 1901 (1 Edw. 7. c. 22), s. 77 (3).

(*g*) *Ibid.*, s. 77 (4); and see p. 478, *post*.

SECT. 1. Special Statutory Provisions.

Notice of these prohibitions must be affixed in the factory or workshop concerned (*h*).

Places where meals may not be taken.

1101. A woman, young person or child must not be allowed to take a meal nor to remain during the times allowed for meals in the following factories or workshops or parts thereof—namely, in the case of glass works, in any part in which the materials are mixed; in the case of glass works where flint glass is made, in any part in which grinding, cutting, or polishing is carried on; in the case of lucifer-match works, in any part in which any manufacturing process or handicraft (except that of cutting the wood) is usually carried on; and in the case of earthenware works, in any part known or used as dippers house, dippers drying room, or china scouring room (*i*). Notice of these prohibitions must be affixed in every factory or workshop concerned (*k*).

Where it appears to the Secretary of State that, by reason of the nature of the process in any other class of factories or workshops or parts thereof, the taking of meals therein is specially injurious to health, he may, by special Order (*l*), extend the prohibition thereto (*m*), and, on proof that such extension is no longer necessary, may rescind it (*n*).

Matches made with white or yellow phosphorus.

1102. It is unlawful for any person to use white or yellow phosphorus in the manufacture of matches, and any factory in which such phosphorus is so used will be deemed to be not kept in conformity with the Acts (*o*).

The occupier of any factory in which the manufacture of matches is carried on must allow a factory inspector at any time to take for analysis sufficient samples of any material in use or mixed for use, and, if he refuses to do so, he will be guilty of obstructing the inspector in the execution of his duties (*p*). The occupier may, when the sample is taken, and on providing the necessary appliances, require the

(*h*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 77 (5). As to the penalty for employment contrary to the Acts, see p. 533, *post*.

(*i*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 78 (1). For penalty for employment contrary to the Acts, see *ibid.*, s. 78 (2), and p. 533, *post*.

(*k*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 78 (3).

(*l*) By Order dated 23rd March, 1898 (1898—No. 227), this prohibition is extended to: the parts of textile factories in which gassing is carried on; the parts of print works, bleaching works, and dyeing works in which singeing is carried on; and the parts of factories or workshops in which are carried on sorting or dusting wool or hair; sorting, dusting, or grinding rags; fur-pulling; grinding, glazing, or polishing on a wheel; brass-cutting; type-founding; dipping metal in aquafortis or other acid solution; metal-bronzing; majolica painting on earthenware; cleaning and repairing catgut; cutting, turning, or polishing bone, ivory, pearl-shell, or snail-shell; manufacturing chemicals, artificial manures, or white lead; and (if and when dry powder or dust is used) lithographic printing, playing-card, fancy box, almanac, artificial flower or colour making, paper staining, or paper colouring and enamelling. For several of the trades indicated in this list there are special rules or regulations, as to which see p. 479, *post*.

(*m*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 78 (4).

(*n*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 78 (5).

(*o*) White Phosphorus Matches Prohibition Act, 1908 (8 Edw. 7, c. 42), ss. 1 (1), 5 (2). For the penalty, see p. 531, *post*.

(*p*) White Phosphorus Matches Prohibition Act, 1908 (8 Edw. 7, c. 42), s. 1 (2). For the penalty, see p. 530, *post*.

inspector to divide the sample taken into two parts and to mark, seal, and deliver to him one part (*a*).

The sale (*b*) and importation (*c*) of matches made with white or yellow phosphorus is forbidden.

SECT. 2.—*Regulations and Special Rules.*

Power to make regulations.

1103. Where the Secretary of State is satisfied that any manufacture, machinery (*d*), plant (*e*), process (*f*), or description of manual labour (*g*) used in factories or workshops is dangerous or injurious to health or dangerous to life or limb, either generally or in the case of women, children, or any other class of persons, he may certify that manufacture, machinery, plant, process, or description of manual labour to be dangerous, and may make such regulations as appear to him to be reasonably practicable and to meet the necessity of the case (*h*). Such regulations may, among

(*a*) White Phosphorus Matches Prohibition Act, 1908 (8 Edw. 7, c. 42), s. 1 (2).

(*b*) *Ibid.*, s, 2. Such matches may be forfeited and destroyed by order of a court of summary jurisdiction. This provision, in the case of retail dealers, comes into operation on 1st January, 1911 (*ibid.*). As to prohibitions in certain trades, see title TRADE AND TRADE UNIONS.

(*c*) *Ibid.*, s. 3. Such matches are included among the goods enumerated and described in the table of prohibitions and restrictions in the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 42, as to which see title REVENUE. As to compulsory licences to use patents for the manufacture of matches without white phosphorus, see *ibid.*, s. 4. As to patents, see title PATENTS, &C.

(*d*) For definition, see p. 446, *ante*.

(*e*) See note (*r*), p. 471, *ante*.

(*f*) For definition, see p. 447, *ante*.

(*g*) See p. 437, *ante*.

(*h*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 79, replacing Factory and Workshop Act, 1891 (54 & 55 Vict. c. 75), s. 8 (1), which provided that after the Secretary of State had certified a trade or process to be dangerous or injurious to health, the chief inspector might serve on the occupier to any factory or workshop "a notice in writing, either proposing such special rules or requiring the adoption of such special measures as appear to the chief inspector to be reasonably practicable and to meet the necessities of the case." Special rules made under the latter Act had to be adopted by each factory or workshop. Special regulations under the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 79, apply to classes of factories or workshops without the necessity of individual adoption. Ss. 8, 9, 10, 12 of, and the First Schedule to the Factory and Workshop Act, 1891 (54 & 55 Vict. c. 75), and ss. 12, 24 (3), 28 of the Factory and Workshop Act, 1895 (58 & 59 Vict. c. 37), which relate to special rules and requirements, are preserved until such time as the special rules made thereunder can be replaced by special regulations made under the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 79, and are to be repealed from a date to be fixed by Order of the Secretary of State (*ibid.*, s. 161, Sched. VII., Part II.). No such Order has yet been issued.

Regulations under the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 79, are in force in respect of the following manufactures and processes:—

Manufacture of felt hats with the aid of inflammable solvent (12th August, 1902 [1902—No. 623]).

File-cutting by hand (19th June, 1903 [1903—No. 507]).

Loading, unloading, moving and handling goods in or at any dock, wharf, or quay, and the processes of loading, unloading or coaling any ship in any dock, harbour, or canal (24th October, 1904 [1904—No. 1617]).

Manufacture of electric accumulators (November 21st, 1903 [1903—No. 1004]).

Spinning by self-acting mules (17th October, 1905 [1905—No. 1103]).

The use of locomotives, waggons, and other rolling stock on lines of rail or

SECT. 2. Regulations and Special Rules.

other things, prohibit the employment of, or modify or limit the period of employment of, all or any class of persons in the manufacture, machinery, plant, process or description of manual labour certified to be dangerous; and prohibit, limit, or control the use

sidings in any factory or workshop, or used in connection therewith, not being part of a railway within the Railway Employment (Prevention of Accidents) Act, 1900 (24th August, 1906 [1906—No. 679]).

Spinning and weaving flax and tow and processes incidental thereto (26th February, 1906 [1906—No. 177]).

Sorting, willeying, washing, combing and carding wool and hair (12th December, 1905 [1905—No. 1293]).

Manufacture of paints and colours in which dry carbonate of lead and red lead is used, or chromate of lead is produced by boiling (21st January, 1907 [1907—No. 17]).

Heading of yarn dyed by means of a lead compound (6th August, 1907 [1907—No. 616]).

Spinning and weaving hemp or jute, or hemp or jute tow, and processes incidental thereto (28th August, 1907 [1907—No. 660]).

Manufacture of nitro- and amido-derivatives of benzine, and the manufacture of explosives with the use of dinitrobenzol or dinitrotoluol (30th December, 1908 [1908—No. 1310]).

Processes involving the use of horsehair from China, Siberia, or Russia (20th December, 1907 [1907—No. 984]). See also Order of 11th March, 1908, as to particulars to be entered in register.

Casting of bronze or any alloy of copper with zinc (20th June, 1908 [1908—No. 484]).

Vitreous enamelling on metal or glass (18th December, 1908 [1908—No. 1258]).

Factories in which East Indian wool is used (18th December, 1908 [1908—No. 1287]).

Generation, transformation, distribution and use of electrical energy in premises under the Acts (23rd December, 1908 [1908—No. 1312]).

Tinning carried on in the manufacture of metal hollow ware, iron drums, and harness furniture (but not including any process in silver plating, or in which a soldering iron is used, or any other process exempted by the chief inspector of factories on the ground that the regulations are not required) (30th June, 1909 [1909—No. 720]).

Manufacture of cutlery (including swords, bayonets, files, and saws), tools, or cutting or piercing instruments of iron or steel (with certain exceptions), and the processes of dry rough glazing in which emery or other similar abrading material is used without the admixture of grease; and any other finishing process involving the abrasion of metal in which dust is created to an injurious extent (15th October, 1909 [1909—No. 1155]).

The special rules made in respect of the following processes under the Factory and Workshop Acts, 1891 (54 & 55 Vict. c. 75) and 1895 (58 & 59 Vict. c. 37), have not yet been replaced by regulations under the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), and are still in force:—

Manufacture of white lead. (In *Creevy* v. *Hannay's Patents Co., Ltd.* (1889), 16 R. (Ct. of Sess.) 993, it was held that sulphate of lead was not "white lead" within the meaning of the (repealed) Factory and Workshop Act, 1883 (46 & 47 Vict. c. 53).)

Enamelling of iron plates.

Manufacture of lucifer matches, except such as are made with red or amorphous phosphorus.

The manufacture of red, yellow, or orange lead.

Lead smelting.

Tinning and enamelling of iron hollow ware, metal hollow ware and cooking utensils.

Chemical works.

Mixing and casting of brass, gun-metal, bell-metal, white-metal, delta-metal, phosphor bronze, and manilla mixture.

Bottling aerated waters and the processes incidental thereto, including the examining and labelling of the bottles.

of any material or process, and modify or extend any special regulations for any class of factories or workshops (*i*); and they may apply to all the factories and workshops in which such manufacture, machinery, plant, process or description of manual labour so certified is used (whether existing when the regulations are made or not), or to any specified class (*k*); to tenement factories and tenement workshops (in which case duties may be imposed on occupiers who do not employ any person, and on owners (*l*)); and to domestic factories and workshops (*m*). They may, moreover, provide for the exemption of any specified class of factories or workshops either absolutely or subject to conditions (*n*).

Application.

1104. Before the Secretary of State makes any such regulations, he must publish notice of the proposal so to do and of the place where copies of the draft regulations are obtainable and of the time within which objections thereto may be made (*o*). Objections must be in writing, and must state the portions of the regulations objected to, the specific grounds of objection, and the omissions, additions, or modifications asked for (*p*). If the Secretary of State does not amend or withdraw the draft regulations objected to, he must direct an inquiry (*q*), to be held in public (*r*), by some competent person appointed for the purpose (*s*). The chief inspector and any

Procedure for making regulations.

Inquiries.

Vulcanising india-rubber by means of bi-sulphide of carbon and processes incidental thereto.

Sorting foreign hides and skins and dry East Indian hides and skins, and processes incidental thereto.

Manufacture and decoration of earthenware and china.

Dusting on colours or adhesive surfaces for the purpose of making transfers for use in the manufacture or decoration of earthenware and china.

Manufacture of bichromate or chromate of potassium or sodium.

Voluntary regulations have been settled and are recommended by the Home Office for adoption in respect of:—Manufacture of wall paper; bronzing; tar distilling. These are to be distinguished from regulations and special rules made under statutory authority.

The provisions with respect to regulations for dangerous trades are applied to docks etc. (see p. 483, *post*), certain buildings (see p. 485, *post*), and certain railway lines and sidings (see p. 486, *post*).

(*i*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 83.

(*k*) *Ibid.*, s. 82 (1).

(*l*) *Ibid.*, s. 82 (2). For definitions, see p. 447, *ante*.

(*m*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 112. If dangerous trades, so certified, are carried on in a domestic factory or workshop, such factory or workshop is to be treated as an ordinary factory or workshop (*ibid.*).

(*n*) *Ibid.*, s. 82 (1).

(*o*) *Ibid.*, s. 80 (1). The time limited must not be less than 21 days (*ibid.*).

(*p*) *Ibid.*, s. 80 (2). Special rules under the Factory and Workshop Act, 1891 (54 & 55 Vict. c. 75), may be amended after establishment, either on the proposal of the Secretary of State or of the occupier; see s. 10 of that Act, and note (*h*), p. 479, *ante*.

(*q*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 80 (3), (4). Under the Factory and Workshop Act, 1891 (54 & 55 Vict. c. 75), s. 8 (as to which see note (*h*), p. 479, *ante*), any difference between the Secretary of State and the individual occupier in respect of any proposed special rule was referred to arbitration in accordance with the First Schedule to that Act.

(*r*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 81 (2).

(*s*) *Ibid.*, s. 81 (1). His fee, which is deemed part of the expenses of the

SECT. 2. Regulations and Special Rules.

objector or other person affected by the draft regulations may appear in person or by counsel, solicitor or agent (*t*), and witnesses may be examined on oath (*a*). In other respects the inquiry must be conducted in accordance with rules made by the Secretary of State (*b*). The person holding the inquiry must report thereon to the Secretary of State (*c*).

Regulations to be laid before Parliament.

Regulations made as above must be laid before both Houses of Parliament, and either House may, within forty days, resolve to annul all or any of them (*d*).

Gazette notices.

Notice of the making of such regulations and of the place where copies of them can be purchased must be published in the *London*, *Edinburgh*, and *Dublin Gazettes* (*e*).

Judicial notice.

The regulations in force are to be judicially noticed (*f*).

Regulations to be posted up.

1105. Printed copies of the regulations for the time being in force are to be kept posted up in conspicuous and convenient places in all factories or workshops where they apply, and in Wales or Monmouthshire they are to be posted up in English and Welsh (*g*).

Printed copies to be available.

The occupier must give a printed copy to any applicant affected by the regulations (*h*). If the occupier of any factory or workshop fails to comply with the provisions as to posting up regulations or giving copies thereof, he is liable to a fine not exceeding £10 (*i*); and any person pulling down, injuring, or defacing regulations or notices thereunder, which have been posted up, is liable to a fine not exceeding £5 (*k*).

To whom regulations apply.

1106. The regulations apply only for the benefit of the persons who are employed in the trade for which they were made; they cannot create any liability of the occupier towards any other party, although the latter may be lawfully in the factory or workshop (*l*).

Penalties.

If any occupier, owner, or manager who is bound to observe any such regulations acts in contravention thereof or fails to comply therewith, he is liable for each offence to a fine (*m*) not exceeding

Secretary of State, is to be such as the Secretary of State may direct (Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 81 (5)).

(*t*) *Ibid.*, s. 81 (2). As to the representation of workmen on an arbitration as to special rules under the Factory and Workshop Act, 1891 (54 & 55 Vict. c. 75), see Factory and Workshop Act, 1895 (58 & 59 Vict c. 37), s. 12; and note (*h*), p. 479, *ante*.

(*a*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 81 (3).

(*b*) *Ibid.*, s. 81 (4). Rules dated 5th February, 1903 [1903—No. 84], for the conduct of inquiries have been made by the Secretary of State.

(*c*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 81 (1).

(*d*) *Ibid.*, s. 84. If one or more regulations of a set be annulled the whole set may be withdrawn (*ibid.*).

(*e*) *Ibid.*, s. 86 (1).

(*f*) *Ibid.*, s. 86 (6). A copy of special rules under the Factory and Workshop Act, 1891 (54 & 55 Vict. c. 75), if certified by an inspector to be a true copy, is evidence of those special rules and of the fact that they have been duly established; see *ibid.*, s. 12, and note (*h*), p. 479, *ante*.

(*g*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 86 (2).

(*h*) *Ibid.*, s. 86 (3).

(*i*) *Ibid.*, s. 86 (4).

(*k*) *Ibid.*, s. 86 (5).

(*l*) *O'Brien* v. *Arbib & Co.*, [1907] S. C. 975.

(*m*) As to recovery of fines, see p. 535, *post*.

£10 and, for a continuing offence, to a fine not exceeding £2 for each day of the continuance of the offence after conviction (*n*). Any person other than the occupier, owner, or manager is liable to a fine not exceeding £2 for each similar offence; and the occupier will also be liable to a fine not exceeding £10, unless he proves that he has taken all reasonable means to prevent such contravention or non-compliance (*o*), by publishing, and to the best of his power enforcing, the regulations. It is not always necessary that the occupier should be able to show that he himself has done any act to enforce the regulations; it may be sufficient if he acts by an agent (*p*).

Agreements.

1107. No person is to be precluded by any agreement from doing, or to be liable under any agreement to any penalty or forfeiture for doing, such acts as may be necessary to comply with any regulations made under the foregoing provisions (*q*).

SECT. 3.—*Docks, Buildings, and Railways.*

Provisions applied to docks.

1108. The provisions with respect to regulations for dangerous trades (*r*), powers to make orders as to dangerous machines (*s*), accidents (*t*), fines in case of death or injury (*a*), and powers of inspectors (*b*), have effect as if every dock (*c*), wharf (*d*), quay and warehouse (*e*), and all machinery or plant (the expression "plant"

(*n*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 85 (1). The penalties for contravention of special rules under the Factory and Workshop Act, 1891 (54 & 55 Vict. c. 75), are contained in s. 9 of that Act, as to which see note (*h*), p. 479, *ante*.

(*o*) Factory and Workshop Act, 1901 (1 Edw. 7), c. 22), s. 85 (2).

(*p*) *Baker* v. *Carter* (1878), 3 Ex. D. 132, decided under the precisely similar provisions of the now repealed Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76).

(*q*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 82 (3).

(*r*) See p. 479, *ante*.

(*s*) See p. 471, *ante*.

(*t*) See p. 472, *ante*.

(*a*) See p. 531, *post*.

(*b*) See p. 529, *post*.

(*c*) The word "dock" means "the solid structure and body of the dock, not the water space within its limits" (*Houlder Line, Ltd.* v. *Griffin*, [1905] A. C. 220, *per* Lord MACNAGHTEN, at p. 224; see also note (*i*), p. 484, *post*).

(*d*) A structure which would be a "wharf" if on or in close proximity to the shore does not cease to be a wharf by the mere fact of its being removed some distance from the shore for the more convenient carrying on of the process of unloading vessels (*Ellis* v. *Cory & Son, Ltd.*, [1902] 1 K. B. 38, C. A.). For decisions of fact whether a structure was or was not a "wharf," see also *Haddock* v. *Humphrey*, [1900] 1 Q. B. 609, C. A.; and *Kenny* v. *Harrison*, [1902] 2 K. B. 168, C. A.

(*e*) A room in the basement under retail sale-rooms used for storing goods temporarily until wanted in the sale-rooms was held not to be a "warehouse" (*Burr* v. *Whiteley* (*William*), *Ltd.* (1902), 19 T. L. R. 117, C. A.). A storage place which is ancillary to a wholesale business is a warehouse, but not if it is ancillary to a retail business (*Green* v. *Britten and Gilson*, [1904] 1 K. B. 350, C. A.). These cases are not to be taken as "laying down an absolute rule of law that no building can be a warehouse if it is connected with a retail business alone; it is possible even in a retail business to have a building which may be in the fullest sense of the term a warehouse" (*Moreton* v. *Reeve*, [1907] 2 K. B. 401, C. A., *per* GORELL BARNES, P., at p. 407). For decisions as to whether particular places are or are not warehouses, see also *Colvine* v. *Anderson and Gibb* (1902), 5 F. (Ct. of Sess.) 255; *M'Ewan* v. *Perth Magistrates* (1905), 7 F. (Ct. of

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here including any gangway or ladder used by any person employed to load or unload or coal a ship (*f*)) used in the process of loading (*g*) or unloading or coaling any ship (*h*) in any dock (*i*), harbour (*k*), or canal were included in the word "factory," and the purpose for which the machinery or plant is used were a manufacturing process, and as if the person who by himself, his agents, or workmen uses any such machinery or plant for the above-mentioned purpose were the occupier (*l*) of the premises (*m*).

Sess.) 714; *Buckingham* v. *Fulham Borough Council* (1905), 69 J. P. 297, C. A.; *Middleton* v. *Wade & Son* (1905), C. A., unreported, cited by COLLINS, M.R., 53 W. R. 629); *Rogers* v. *Manchester Packing Co.*, [1898] 1 Q. B. 344, *per* DAY, J., at p. 348.

(*f*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 104 (2).

(*g*) "Finishing off" a hold on board a ship by putting iron cross-beams across the hatchway after the actual putting of the goods into the hold has been completed is part of the process of "loading" (*Lysons* v. *Knowles* (*Andrew*) *& Sons, Ltd.*, *Stuart* v. *Nixon and Bruce*, [1901] A. C. 79; see also *Reid* v. *Anchor Line* (1903), 5 F. (Ct. of Sess.) 435; *Durrie* v. *Warren & Co.* (1899), 15 T. L. R. 365, C. A.; and *Medd* v. *MacIver* (1899), 15 T. L. R. 364, C. A.).

(*h*) The expression "ship" has the same meaning as in the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 742, namely, "every description of vessel used in navigation not propelled by oars" (Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 104 (2)). See also title SHIPPING AND NAVIGATION.

(*i*) The term "ship in any dock" includes a dry dock (*Raine* v. *Jobson & Co.*, [1901] A. C. 404). "The Act speaks of a dock in general terms, without reference to whether it is wet or dry" (*Cattermole* v. *Atlantic Transport Co.*, [1902] 1 K. B. 204, C. A., *per* STIRLING, L.J., at p. 207; see also *Houlder Line, Ltd.* v. *Griffin*, [1905] A. C. 220; *Burdon* v. *Gregson & Co.*, [1906] 2 K. B. 283, C. A., *per* ROMER, L.J., at pp. 286, 287; and *Hanlon* v. *North City Milling Co.*, [1903] 2 I. R. 163, C. A.). See also, as to docks, titles SHIPPING AND NAVIGATION; WATERS AND WATERCOURSES.

(*k*) The term "harbour" has the same meaning as in the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 742, namely, "harbours properly so called, whether natural or artificial, estuaries, navigable rivers, piers, jetties, and other works in or at which ships can obtain shelter, or ship and unship goods or passengers" (Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 104 (2); and see titles SHIPPING AND NAVIGATION; WATERS AND WATERCOURSES.

(*l*) The Factory and Workshop Acts contain no definition of the terms "occupier" or "actual use or occupation," but their meaning in relation to the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), ss. 104—106, has been discussed in the following cases. (When used in other parts of the Acts their meaning is not necessarily the same.) Ship repairers who hired a berth in a dock "were in the actual use or occupation of premises within the dock or forming part of it" (*Raine* v. *Jobson & Co.*, [1901] A. C. 404, *per* Earl of HALSBURY, L.C., at p. 408); and "From the decision of the House of Lords in *Raine* v. *Jobson & Co.*, it is clear that persons repairing a ship in a dock are occupiers of a factory" (*Bartell* v. *Gray* (*W.*) *& Co.*, [1902] 1 K. B. 225, C. A., *per* COLLINS, M.R., at p. 229). Contractors in possession of a ship for the purpose of repairing her may be occupiers thereof although their use or occupation may not be exclusive (*Bartell* v. *Gray* (*W.*) *& Co.*, *supra*); "Since the decision in *Bartell* v. *Gray* (*W.*) *& Co.*, I should have thought there could be no question in this court that several persons may at the same time be occupiers of premises within the meaning of the Act for different purposes" (*Weavings* v. *Kirk and Randall*, [1904] 1 K. B. 213, C. A., *per* MATHEW, L.J., at p. 217). On this point, see also *Burdon* v. *Gregson & Co.*, *supra*, following *Smith* v. *Standard Steam Fishing Co.*, [1906] 2 K. B. 275, C. A. "In this case we have a ship moored alongside of a quay, and, for the whole length of the ship, the quay side is devoted to the use of the shipowners for the purpose for which quays are used, namely, for the unloading or loading

(*m*) For note (*m*) see next page.

For the enforcement of such provisions the person having the actual use or occupation (*n*) of a dock (*o*), wharf (*p*), quay or warehouse (*q*), or of any premises within the same or forming part thereof, and the person so using any machinery or plant, is deemed to be the occupier of a factory (*m*).

Application to buildings under construction.

1109. The same provisions also have effect as if any premises on which machinery worked by steam, water, or other mechanical power (*r*) is temporarily used for the purpose of the construction of a building (*s*), or any structural work in connection with a building, were included in the word "factory," and the purpose of which the machinery is used were a manufacturing process, and as if the person who, by himself, his agents or workmen, temporarily uses any such machinery for the before-mentioned purpose were the occupier of the said premises; and for the purpose of the enforcement of those provisions the person so using any such machinery is deemed to be the occupier of a factory (*t*).

Other buildings.

The provisions relating to notice of accidents (*u*) and the formal investigation of accidents (*v*) have effect as if any building

of the ship and other matters ancillary thereto. If that is not 'actual use' of the quay, I do not see what can be. The Act does not insist on more than 'actual use' of the quay, for the collocation of those words disjunctively with the word 'occupation' involves that 'use' must mean something less than legal occupation" (*Merrill* v. *Wilson, Sons & Co., Ltd.*, [1901] 1 K. B. 35, C. A., *per* COLLINS, L.J., at p. 43, followed in *Hainsborough* v. *Ralli Brothers* (1901), 18 T. L. R. 21, C. A.). Tenants of a small hut in a dock who supplied horses for haulage purposes in the dock were held to have actual use or occupation of the dock, and, therefore, to be occupiers of a factory (*Pacific Steam Navigation Co.* v. *Pugh & Son* (1907), 23 T. L. R. 622, C. A.); see also *Carrington* v. *Bannister & Co.*, [1901] 1 K. B. 20, C. A.; *Jackson* v. *Rodger & Co.* (1899), 1 F. (Ct. of Sess.) 1053, (1900), 2 F. (Ct. of Sess.) 533; *Bruce* v. *Henry & Co.* (1900), 2 F. (Ct. of Sess.) 717; *Low* v. *Abernethy & Co.* (1900), 2 F. (Ct. of Sess.) 722; *Purves* v. *Sterne & Co., Ltd.* (1900), 2 F. (Ct. of Sess.) 887; *Stewart* v. *Dublin and Glasgow Steam Packet Co.* (1902), 5 F. (Ct. of Sess.) 57; *Stewart* v. *Darngavil Coal Co., Ltd.* (1902), 4 F. (Ct. of Sess.) 425; *Ramsay* v. *Mackie* (1904), 7 F. (Ct. of Sess.) 106; *Fogarty* v. *Wallis & Co.*, [1903] 2 I. R. 522, C. A.; *Morgan* v. *Tydvil Engineering and Ship Repairing Co.* (1908), 98 L. T. 762, H. L., following *Houlder Line, Ltd.* v. *Griffin*, [1905] A. C. 220.

(*m*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 104 (1). For the liabilities of the occupier of a factory, see p. 531, *post*.

(*n*) See note (*l*) p. 484, *ante*.

(*o*) See note (*c*), p. 483, *ante*.

(*p*) See note (*d*), p. 483, *ante*.

(*q*) See note (*e*), p. 483, *ante*.

(*r*) See notes (*g*) and (*h*), p. 436, *ante*.

(*s*) The word "building" here includes a temporary but substantial structure, such as a wooden platform for a steam crane (*Aylward* v. *Matthews*, [1905] 1 K. B. 343, C. A.). For the ordinary meaning of the word in statutes, see *Moir* v. *Williams*, [1892] 1 Q. B. 264, C. A., *per* Lord ESHER, M.R., at p. 270; and see also title BUILDING CONTRACTS, ENGINEERS AND ARCHITECTS., Vol. III., p. 175. For the meaning of the word in the Public Health and London Building Acts, see titles HIGHWAYS, STREETS, AND BRIDGES; METROPOLIS; PUBLIC HEALTH AND LOCAL ADMINISTRATION; and as to the Acts relating to the Parliamentary and Local Government franchise, see title ELECTIONS, Vol. XII., pp. 185, 186.

(*t*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 105 (1). For the meaning of the term "occupier of a factory" in these sections, see note (*l*), p. 484, *ante*, and for the liabilities of the occupier, see p. 531, *post*.

(*u*) See p. 472, *ante*.

(*v*) See p. 473, *ante*.

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exceeding 30 feet in height (*w*), which is being constructed or repaired (*x*) by means of a scaffolding (*y*), or in which more than twenty persons, not being domestic servants, are employed for wages, were included in the word "factory," and as if, in the first case, the employer of the persons engaged in the construction or repair, and, in the second case, as if the occupier of the building, were the occupier of a factory (*z*).

Application to railways.

1110. Where any railway line or siding, not being part of a railway used for the purposes of public traffic or of any works of the railway company connected with the railway (*a*), is used in connection with a factory or workshop, or with any place to which any of the provisions of the Acts apply, the provisions with respect to regulations for dangerous trades (*b*), powers to make orders as to

(*w*) The height is the height at the time of the accident (*Billings* v. *Holloway*, [1899] 1 Q. B. 70, C. A.). It is to be measured to the top of the roof (*Hoddinott* v. *Newton, Chambers & Co.*, [1899] 1 Q. B. 1018, C. A., reversed, but not on this point, in the House of Lords, [1901] A. C. 49), and from the surface of the ground within the building (*McGrath* v. *Neill & Sons*, [1902] 1 K. B. 211, C. A.; but compare *Halstead* v. *Thomson & Sons* (1901), 3 F. (Ct. of Sess.) 668). For decisions upon cases where part of a contiguous set of buildings is over and part under 30 feet high, see *Rixsom* v. *Pritchard and Renwick*, [1900] 1 Q. B. 800, C. A.; *Knight* v. *Cubitt & Co.*, [1902] 1 K. B. 31, C. A.; and *Hartley* v. *Quick*, [1905] 1 K. B. 359, C. A.

(*x*) A building is being "constructed" until the scaffolding has been cleared away (*Frid* v. *Fenton* (1900), 82 L. T. 193, C. A.; *McCabe* v. *Jopling and Palmer's Travelling Cradle, Ltd.*, [1904] 1 K. B. 222, C. A.), and until the "measuring up" has been completed (*Plant* v. *Wright & Co.*, [1905] 1 K. B. 353, C. A.). The terms "construction" and "repair" as here used are not limited to the original construction of the building, nor to its construction or repair as a whole (*Hoddinott* v. *Newton, Chambers & Co., Ltd.*, [1901] A. C. 49). Painting and whitewashing come under the head of repairing (*Dredge* v. *Conway, Jones & Co.*, [1901] 2 K. B. 42, C. A.; *Reddy* v. *Broderick*, [1901] 2 I. R. 328, C. A.). A building is being "constructed or repaired by means of a scaffolding" even though the scaffolding has been temporarily removed at the time of the accident (*Halstead* v. *Thomson & Sons, supra*); and it is immaterial that the scaffolding was put up and solely used by some person other than the actual employer of the person injured (*Fletcher* v. *Hawley* (1905), 21 T. L. R. 191, C. A., following *Mason* v. *Dean (A. R.), Ltd.*, [1900] 1 Q. B. 770, C. A.).

(*y*) Whether any particular structure is a "scaffolding" is a question of law when the facts have been ascertained (*Hoddinott* v. *Newton, Chambers & Co., Ltd., supra*, overruling on this point *Wood* v. *Walsh & Sons*, [1899] 1 Q. B. 1009, C.A.; *Maude* v. *Brook*, [1900] 1 Q. B. 575, C. A.; and *Ferguson* v. *Green*, [1901] 1 K. B. 25). Mere boards or planks may be "scaffoldings," see *Maude* v. *Brook, supra*; *Reddy* v. *Broderick, supra*; and *Veasey* v. *Chattle*, [1902] 1 K. B. 494, C. A. As to when a ladder can be regarded as a "scaffolding," see *McDonald* v. *Hobbs and Samuel* (1899), 2 F. (Ct. of Sess.) 3; *Marshall* v. *Rudeforth*, [1902] 2 K. B. 175, C. A.; *Elvin* v. *Woodward & Co.*, [1903] 1 K. B. 838, C. A.; *Campbell* v. *Sellars* (1903), 5 F. (Ct. of Sess.) 900; *Crowther* v. *West Riding Window Cleaning Co.*, [1904] 1 K. B. 232, C. A.; and *O'Brien* v. *Dobbie & Son*, [1905] 1 K. B. 346, C. A. The expression is not limited to a scaffolding adequate for the construction or repair of the building as a whole (*Hoddinott* v. *Newton, Chambers & Co., Ltd., supra*).

(*z*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 105 (2); and see note (*l*), p. 484, *ante*.

(*a*) Railway Employment (Prevention of Accidents) Act, 1900 (63 & 64 Vict. c. 27), s. 16, incorporated by Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 106 (1).

(*b*) See p. 479, *ante*.

dangerous machines (*c*), accidents (*d*), fines in case of death or injury (*e*), and powers of inspectors (*f*), have effect as if the line or siding were part of the factory or workshop (*g*). If any such line or siding is used in connection with more than one factory or workshop belonging to different occupiers, the same provisions have effect as if the line or siding were a separate factory (*h*).

Part V.—Conditions as to Employment and Remuneration.

SECT. 1.—*Fitness for Employment.*

Men.

1111. There are no general restrictions as to the employment of adult men in factories and workshops.

Women and girls.

1112. The occupier of a factory or workshop must not knowingly allow a woman or girl to be employed therein within four weeks after childbirth (*i*).

Children under twelve.

1113. A child under the age of twelve years must not be employed in a factory or workshop (*j*).

Children under fourteen.

1114. A child under the age of fourteen years must not be employed to lift, carry, or move anything so heavy as to be likely to cause him injury, nor in any occupation likely to be injurious to his life, limb, health, or education, regard being had to his physical condition (*k*). The penalty for contravention is a fine not exceeding 40*s*., or for a subsequent offence not exceeding £5 (*l*); but the information must be laid within three months after the commission of the offence (*m*).

Certificate of fitness.

1115. In a factory, other than a domestic factory (*n*), a young

(*c*) See p. 471, *ante*.
(*d*) See p. 472, *ante*.
(*e*) See p. 531, *post*.
(*f*) See p. 529, *post*.
(*g*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 106 (1).
(*h*) *Ibid.*, s. 106 (2).
(*i*) *Ibid.*, s. 61. As to the penalty for employment contrary to the Acts, see p. 533, *post*.
(*j*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 62. The section continues "unless lawfully so employed at the commencement of this Act." The Act came into operation on 1st January, 1902 (*ibid.*, s. 162). As to the penalty for employment contrary to the Acts, see p. 533, *post*. In *Carty* v. *Nicoll* (1878), 6 R. (Ct. of Sess.) 194, two of the judges of the Court of Session expressed the opinion that if a child obtains employment by misrepresenting his age, and his master has no opportunity of discovering the true facts, the latter has committed no offence.
(*k*) Employment of Children Act, 1903 (3 Edw. 7, c. 45), ss. 3, 13. The expression "employ" is defined (*ibid.*, s. 13) to "include employment in any labour exercised by way of trade or for the purposes of gain, whether the gain be to the child or to any other person." As to protection of children generally, see INFANTS AND CHILDREN.
(*l*) Employment of Children Act, 1903 (3 Edw. 7, c. 45), s. 5.
(*m*) *Ibid.*, s. 7.
(*n*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 111 (3). For definition, see p. 441, *ante*.

SECT. 1. Fitness for Employment.

person (*o*) under the age of sixteen years or a child (*p*) must not be employed for more than seven or, if the certifying surgeon for the district (*q*) resides more than three miles from the factory, thirteen work days, unless the occupier has obtained a certificate, in the prescribed form, of the fitness of the young person or child for employment in the factory, which must be produced to an inspector when required (*r*). When a child becomes a young person a fresh certificate of fitness must be obtained (*s*).

By whom granted.

The certificate of fitness is granted by the certifying surgeon of the district (*q*) after personal examination of the party named therein, which, as well as the signing of the certificate, he is to carry out at the place of employment, unless less than five young persons and children are employed there, or some special reason is allowed in writing by an inspector (*t*). It must be to the effect that the surgeon is satisfied by the production of a certificate of birth (*u*) or other sufficient evidence (*v*) that the party named therein is of the age therein specified, and has been personally examined by him and is not incapacitated by disease or bodily infirmity for working daily for the time allowed by law in the factory named in the certificate (*a*). The certificate may be qualified by conditions as to the work on which the child or young person is fit to be employed, in which case the employment must be in accordance with such conditions (*b*). All factories in the same occupation in the certifying surgeon's district may be named in the certificate (*c*). A certificate of fitness for employment in a tenement factory (*d*) is valid for similar employment in any part of the same tenement factory (*e*). The certifying surgeon may be required to give in writing, and sign, the reasons for his refusal of a certificate of fitness (*f*).

Effect of.

Refusal to grant.

The Secretary of State may, by special Order (*g*), extend to any

(*o*) For definition, see p. 445, *ante*.
(*p*) For definition, see p. 445, *ante*.
(*q*) See p. 530, *post*.
(*r*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 63 (1), (3).
(*s*) *Ibid.*, s. 63 (2). As to the penalty for employment contrary to the Acts, see p. 533, *post*.
(*t*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 64 (1), (2), (3).
(*u*) Such certificate is to be either a certified copy of the entry in the register of births, or a certificate from a local authority within the meaning of the Elementary Education Act, 1876 (39 & 40 Vict. c. 79), that it appears from the returns transmitted to such authority by the registrar of births that the child was born on the date in the certificate (Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 64 (8)). As to special provisions for obtaining a certificate of birth, see p. 489, *post*. See also title REGISTRATION OF BIRTHS, MARRIAGES AND DEATHS.
(*v*) The factory inspector may annul the certificate of fitness, if founded on evidence of age other than a birth certificate, on it appearing that the age is overstated (Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 64 (9)).
(*a*) *Ibid.*, s. 64 (4).
(*b*) *Ibid.*, s. 64 (5).
(*c*) *Ibid.*, s. 64 (7).
(*d*) For definition, see p. 441, *ante*.
(*e*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 89.
(*f*) *Ibid.*, s. 64 (10).
(*g*) These provisions are extended to workshops in which are carried on the

class of workshops or domestic factories (*h*) the foregoing provisions as to certificates of fitness, and may revoke such order without prejudice to the subsequent making of another order (*i*). The occupier of any workshop or domestic factory may, if he thinks fit (*k*), obtain certificates of fitness in like manner (*l*).

Power of inspector to require certificate.

1116. Where an inspector is of opinion that a young person (*m*) under the age of sixteen or a child (*n*) is, by disease or bodily infirmity, incapacitated for working daily for the period allowed by law (*o*), he may (notwithstanding any previous certificate of fitness) serve written notice on the occupier of the factory or workshop where such young person or child is employed, requiring the discontinuance of such employment, and thereafter the young person or child must not be employed until the certifying surgeon has personally examined him and certified that the alleged incapacity does not exist (*p*).

Education.

1117. Where a child is employed in a factory or workshop, both the occupier thereof and the parents of the child are responsible for the due education of the child (*q*).

Obtaining birth certificate.

1118. Where the age of any young person under the age of sixteen years or of a child (*r*) is required to be ascertained or proved for the purpose of the Acts, or for any purpose connected with his employment in labour or with elementary education, any person is entitled, on presenting a written requisition in the prescribed form (*s*), and on payment of 6*d*., to obtain a certified copy of the entry in the register of births relating to such young person or child (*t*).

processes of file cutting; carriage building; rope and twine making; brick and tile making; making of iron and steel cables, chains, anchors, grapnels, cart gear, nails, screws, and rivets; baking bread, biscuits, or confectionery; fruit preserving; and making, altering, ornamenting, finishing, or repairing of wearing apparel by the aid of treadle sewing machines (Order of 31st August, 1906 [1906—No. 680]).

(*h*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 111 (3). For definition, see p. 441, *ante*.

(*i*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 66.

(*k*) The purpose of the provision is expressed to be "to enable occupiers of workshops to better secure the observance of this Act and prevent the employment in their workshops of young persons under the age of sixteen years and children who are unfitted for that employment" (*ibid.*, s. 65).

(*l*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 65.

(*m*) For definition, see p. 445, *ante*.

(*n*) For definition, see p. 445, *ante*.

(*o*) See pp. 490 *et seq.*, *post*.

(*p*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 67. As to the penalty for employment contrary to the Act, see p. 533, *post*.

(*q*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), ss. 68—72. The duties and liabilities of employers and parents under these sections are fully set out under title EDUCATION, Vol. XII., pp. 67—70.

(*r*) For definition, see p. 445, *ante*.

(*s*) The form is prescribed by Order of the Local Government Board dated 15th March, 1910 [1910—No. 301]. The certified copy of the entry is to be supplied, on request and without charge, by every superintendent registrar and registrar of births, marriages, and deaths (Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 134).

(*t*) *Ibid.*

SECT. 2. General Provisions as to Hours etc.

SECT. 2.—*General Provisions as to Hours, Meal-times, and Holidays in Factories and Workshops* (*a*).

SUB-SECT. 1.—*Sunday Employment.*

Sunday employment.

1119. A woman (*b*), young person (*c*), or child (*d*) must not be employed in a factory or workshop on Sunday (*e*).

SUB-SECT. 2—*Hours of Employment in Textile Factories and Print Works.*

Women and young persons.

1120. The period of employment for women (*b*) and young persons (*c*) in textile factories (*f*), or in print works (*g*), or bleaching and dyeing works (*h*) (but excluding domestic factories (*i*)), except on Saturday, is either to begin at 6 a.m. and end at 6 p.m. or begin at 7 a.m. and end at 7 p.m. (*j*).

On Saturday.

On Saturday the period of employment is to begin either at 6 a.m or 7 a.m. If it begins at 6 a.m., then, if not less than one hour is allowed for meals, it is to end at noon as regards employment in any manufacturing process, and at 12.30 p.m. as regards employment for any purpose whatever; but if less than one hour is allowed for meals, employment is to end at 11.30 a.m. as regards employment in any manufacturing process, and at noon as regards employment for any purpose whatever. If employment begins at 7 a.m., it is to end at 12.30 p.m. as regards any manufacturing process, and at 1 p.m. as regards employment for any purpose whatever (*k*).

Meal times.

For meals there is to be allowed on Saturday not less than half an hour, and on every other day not less than two hours, of which at least one hour, either at the same or at different times, is to be before 3 p.m. (*l*).

Continuous employment of women or young persons.

A woman (*m*) or young person (*n*) is not to be employed continuously (*o*) in a textile factory for more than four hours and a half without an interval of at least half an hour for a meal (*p*).

(*a*) In this section are included the rules of general application. "Special exceptions as to hours and holidays" are dealt with separately (pp. 497—509, *post*). As to the penalty for employment contrary to the provisions of the Factory and Workshop Acts, see p., 533 *post*.

(*b*) For definition, see p. 445, *ante*.

(*c*) For definition, see p. 445, *ante*.

(*d*) For definition, see p. 445, *ante*.

(*e*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 34. There are special exceptions as to creameries (p. 507, *post*), and in respect to persons of the Jewish religion (p. 508, *post*).

(*f*) For definition, see p. 436, *ante*.

(*g*) For definition, see p. 438, *ante*.

(*h*) For definition, see p. 438, *ante*.

(*i*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 111 (1); and see p. 441, *ante*.

(*j*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 24 (1), and (as to print works and bleaching and dyeing works) *ibid.*, s. 28. There are special exceptions as to factories driven by water power (p. 501, *post*); factories of which the occupier is of the Jewish religion (p. 508, *post*); and the employment of male young persons above sixteen in lace factories (p. 504, *post*).

(*k*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 24. As to what is a manufacturing process, see *Crabtree* v. *Commercial Mills Spinning Co., Ltd.* (1910), 130 L. T. Jo. 55.

(*l*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 24 (5).

(*m*) For definition, see, p. 445, *ante*.

(*n*) For definition, see, p. 445, *ante*.

(*o*) For definition of "continuous employment," see p. 446, *ante*.

(*p*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 24 (6). There are special exceptions in respect of textile factories used for making elastic web,

In the case of print works or bleaching and dyeing works such period of continuous employment may be for five hours (*q*).

SECT. 2. General Provisions as to Hours etc.

1121. A child (*r*) is only to be employed in textile factories and in print works and bleaching and dyeing works (*q*), excluding domestic factories (*s*), on the system either of employment in morning and afternoon sets, or of employment on alternate days only (*a*).

Employment of children on weekdays.

The period of employment for a child in a morning set, except on Saturday, is to begin at the same hour as if the child were a young person (*b*), and end either at 1 p.m., or, if the dinner time begins before 1 p.m., at the beginning of dinner time, or, if the dinner time does not begin before 2 p.m., at noon. In an afternoon set, except on Saturday, it is to begin either at 1 p.m., or at any later hour at which the dinner time terminates; or, if the dinner hour does not begin before 2 p.m., and the morning set ends at noon, at noon; and it is to end at the same hour as if the child were a young person (*c*).

Morning and afternoon sets.

On Saturday the period of employment for a child is to begin and end as if the child were a young person (*d*).

On Saturdays.

A child is not to be employed in two successive periods of seven days in the morning set, nor in two successive periods of seven days in an afternoon set, nor may a child be employed on two successive Saturdays, nor on Saturday in any week (*e*) in which his period of employment has on any other day exceeded five hours and a half (*f*).

Breaks.

Where a child is employed on the alternate day system the period of employment and the time allowed for meals are to be the same as if he were a young person (*g*); but he is not to be employed on two successive days, nor on the same day of the week in two successive weeks (*h*).

Alternate day system.

A child is not to be employed continuously (*i*) on either system in a textile factory for more than four and a half hours without an interval of at least half an hour for a meal (*k*). In the case of print works or bleaching and dyeing works, such period of continuous employment may be for five hours (*l*).

Continuous employment of children.

ribbon, or trimming, and in respect of other textile factories to which the exception may be extended by special order (p. 505, *post*).

(*q*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 28. For definitions, see p. 438, *ante*.

(*r*) For definition, see p. 445, *ante*.

(*s*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 111 (1).

(*a*) *Ibid.*, ss. 25 (1), 28.

(*b*) See p. 490, *ante*.

(*c*) See p. 490, *ante*; and Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 25 (2) (3).

(*d*) See p. 490, *ante*; and Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 25 (4).

(*e*) For definition, see p. 446, *ante*.

(*f*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 25 (5).

(*g*) See p. 490, *ante*.

(*h*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 25 (6).

(*i*) For definition of "continuous employment," see p. 446, *ante*.

(*k*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 25 (7). There are special exceptions as in the cases mentioned in note (*p*), p. 490, *ante*.

(*l*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 28.

SECT. 2. General Provisions as to Hours etc.

SUB-SECT. 3.—*Hours of Employment in Non-textile Factories and Workshops.*

Women and young persons.

1122. For women (*m*) and young persons (*n*) employed in non-textile factories (*o*) (except print works, bleaching and dyeing works (*p*), and domestic factories (*a*)), or in workshops (*b*) (except domestic workshops (*a*)), the period of employment, except on Saturday, is either to begin at 6 a.m. and end at 6 p.m., or begin at 7 a.m. and end at 7 p.m., or begin at 8 a.m. and end at 8 p.m. (*c*).

Saturday.

On Saturday the period of employment is to begin at 6 a.m. and end at 2 p.m., or begin at 7 a.m. and end at 3 p.m., or begin at 8 a.m. and end at 4 p.m. (*d*); but in a non-textile factory or workshop where a woman or young person has not been actually employed for more than eight hours on any day in a week (*e*), and notice of such non-employment has been affixed in the factory or workshop and served on the inspector, the period of employment on Saturday in that week for that woman or young person may be from 6 a.m. to 4 p.m., with an interval of not less than two hours for meals (*f*).

Meal times.

For meals there is to be allowed on Saturday not less than half an hour, and on every other day not less than one hour and a half, of which one hour at least, either at the same or at different times, is to be before 3 p.m. (*g*).

Continuous employment.

A woman or a young person in a non-textile factory and a young person in a workshop is not to be employed continuously (*h*) for more than five hours without an interval of at least half an hour for a meal (*i*).

Children.

1123. Children are only to be employed in non-textile factories (other than print works, bleaching and dyeing works (*k*) and domestic

(*m*) For definition, see p. 445, *ante*. By the Employment of Women Act, 1907 (7 Edw. 7, c. 10), s. 1, the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 57, relating to the employment of women in flax scutch mills, is repealed.

(*n*) For definition, see p. 445, *ante*.

(*o*) For definition, see p. 437, *ante*.

(*p*) As to these, see pp. 490, 491, *ante*.

(*a*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 111 (1); and see p. 494, *post*.

(*b*) For definition, see p. 441, *ante*.

(*c*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 26 (1). There are special exceptions as follows:—In any class of non-textile factories or workshops where the hours may be fixed by special Order at 9 a.m. to 9 p.m. (see p. 503, *post*); in bakehouses, in respect of the employment of male young persons (see p. 504, *post*); in fish and fruit preserving (see p. 506, *post*); in creameries (see p. 507, *post*); in factories and workshops the occupier of which is of the Jewish religion (see p. 508, *post*). See also the provisions as to overtime (pp. 498—501, *post*); and night work (pp. 501—503, *post*).

(*d*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 26 (2). There are special exceptions, as in the cases included in note (*c*), *supra*; also in respect of employment in Turkey red dyeing (see p. 501, *post*).

(*e*) For definition, see p. 446, *ante*.

(*f*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 30. A special exception substituting another day for Saturday may be granted by special Order to any class of non-textile factories or workshops (see p. 507, *post*).

(*g*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 26 (3).

(*h*) For definition of "continuous employment," see p. 446, *ante*.

(*i*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 26 (4).

(*k*) These works have the same hours as textile factories; see p. 490, *ante*.

factories (*l*)), or in workshops (other than domestic workshops (*l*)), either on the system of morning and afternoon sets, or (in a factory or workshop in which not less than two hours are allowed for meals every day except Saturday) on the alternate day system (*m*).

The period of employment for a child (*n*) in the morning set, including Saturday, is to begin at 6 a.m., or 7 a.m., or 8 a.m., and end at the times fixed for children in the morning set in textile factories (*o*). In an afternoon set, including Saturday, it is to begin at 1 p.m., or at any hour, later than 12.30 p.m., at which the dinner time ends, or if the dinner time does not begin before 2 p.m. and the morning set ends at noon, at noon; and is to end on Saturday at 2 p.m., and on any other day at 6 p.m., or 7 p.m., or 8 p.m., according as the period of employment in the morning set began at 6 a.m., or 7 a.m., or 8 a.m. (*p*).

Breaks.

A child is not to be employed in two successive periods of seven days in the same set, nor on Saturday in the same set in which he has been employed on any other day of the same week (*q*).

Alternate day system.

Where a child is employed on the alternate day system, the period of employment, except on Saturday, is to begin either at 6 a.m. and end at 6 p.m., or at 7 a.m. and end at 7 p.m., or at 8 a.m. and end at 8 p.m. On Saturday it is to begin at 6 a.m. or 7 a.m. and end at 2 p.m., or begin at 8 a.m. and end at 4 p.m. For meals there is to be allowed not less than two hours on any day except Saturday, and half an hour on Saturday. Such child is not to be employed in any manner on two successive days, nor on the same day of the week in two successive weeks (*r*).

Continuous employment.

On neither system may a child be employed continuously (*s*) for more than five hours without an interval of at least half an hour for a meal (*a*).

SUB-SECT. 4.—*Hours of Employment in Women's Workshops, and in Domestic Factories and Workshops.*

Women's workshops.

1124. In a women's workshop (*b*), if the occupier has served on an inspector notice that the workshop is of that character, the period of employment for a woman, except on Saturday, is to be a specified period of twelve hours between 6 a.m. and 10 p.m., during which not less than one and a half hours are to be allowed for meals

(*l*) Factory and Workshop Act, 1901 (1 Edw. c. 22), s. 111 (1). For hours in domestic factories and workshops, see p. 494, *post*.

(*m*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 27 (1).

(*n*) For definition, see p. 445, *ante*.

(*o*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 27 (2); and see p. 491, *ante*. There is a special exception in favour of classes of factories or workshops where by special Order the period of employment is allowed to begin at 9 a.m. (see p. 503, *post*).

(*p*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 27 (3). There is a special exception in favour of classes of factories or workshops where by special Order the period of employment is allowed to end at 8 p.m (see p. 503, *post*). See also provisions as to overtime, p. 498, *post*.

(*q*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 27 (4).

(*r*) *Ibid.*, s. 27 (5). For definition of "week," see p. 446, *ante*.

(*s*) For definition of "continuous employment," see p. 446, *ante*.

(*a*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 27 (6).

(*b*) For definition, see p. 443, *ante*.

SECT. 2. General Provisions as to Hours etc.

and absence from work. On Saturday it is to be a specified period of eight hours between 6 a.m. and 4 p.m., during which not less than half an hour is to be allowed for meals and absence from work (*c*).

After notice has been given to the inspector that a workshop is to be conducted as a women's workshop, it will be deemed to be conducted on that system until the occupier changes it. No such change may be made until the occupier has served upon the inspector notice of his intention to change the system; and until the change a child (*d*) or young person (*e*) employed therein will be deemed to be employed contrary to the Acts (*f*). Such change is not to be made oftener than once a quarter unless for special cause allowed in writing by an inspector (*g*).

Domestic factories and workshops. Young persons.

1125. In a domestic factory (*h*) or a domestic workshop (*i*) the period of employment for a young person (*e*) on Saturday is to begin at 6 a.m. and end at 4 p.m., and on other days it is to begin at 6 a.m. and end at 9 p.m.; and during that period the time to be allowed for meals and absence from work is to be not less than two and a half hours on Saturday, and not less than four and a half hours on other days (*k*).

Children.

1126. For a child (*l*) the period of employment in a domestic factory or domestic workshop is either to begin at 6 a.m. and end at 1 p.m., or begin at 1 p.m. and end at 8 p.m., or, on Saturday, at 4 p.m. (*m*).

Such child is not to be employed before 1 p.m. in two successive periods of seven days, nor after 1 p.m. in two successive periods of seven days, nor on Saturday before 1 p.m. if on any other day in the same week he has been employed before that hour, nor after that hour if on any other day of the same week he has been employed after that hour (*m*). Such child is not to be employed continuously (*n*) for more than five hours, without an interval of at least half an hour for a meal (*o*).

SUB-SECT. 5.—*General Conditions.*

Employment inside and outside factory or workshop on same day.

1127. A child (*p*) must not, except during the period of employment, be employed in the business of a factory or workshop outside the factory or workshop on any day during which he is employed in the factory or workshop, nor a woman (*q*) or young person (*r*) on

(*c*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 29 (1)
(*d*) For definition, see p. 445, *ante*.
(*e*) For definition, see p. 445, *ante*.
(*f*) As to the penalty, see p, 533, *post*.
(*g*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 29 (2).
(*h*) For definition, see p. 441, *ante*.
(*i*) For definition, see p. 442, *ante*.
(*k*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 111 (1).
(*l*) For definition, see p. 445, *ante*.
(*m*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 111 (1). For definition of "week," see p. 446, *ante*.
(*n*) For definition of "continuous employment," see p. 446, *ante*.
(*o*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 111 (1).
(*p*) For definition, see p. 445, *ante*.
(*q*) For definition, see p. 445, *ante*.
(*r*) For definition, see p. 445, *ante*.

any day during which she or he is employed in the factory or workshop both before and after the dinner hour (*a*). For the purposes of this provision a woman, young person, or child to or for whom any work is given out, or who is allowed to take out any work to be done by her or him outside a factory or workshop, is deemed to be employed outside the factory or workshop on the day on which the work is so given or taken out (*b*).

If a woman or young person is employed by the occupier of a factory or workshop on the same day both in the factory or workshop and in a shop (*c*), then the whole time during which that woman or young person is employed is not to exceed the hours prescribed for her or his employment in the factory or workshop on that day; and if the woman or young person is employed in the shop except during the period of employment fixed by the occupier and specified in a notice (*d*) affixed in the factory or workshop, the occupier is to make the prescribed entry in the general register (*e*) with regard to her or his employment (*f*).

Employment contrary to these provisions is employment contrary to the Acts (*g*).

Notices fixing hours of employment.

1128. The occupier of every factory and workshop (domestic factories (*h*) and domestic workshops (*i*) excepted (*k*)) may, within the limits allowed by the Acts, fix the period of employment (*l*), the times allowed for meals (*l*), and the system of employment of children (*m*), and he must specify in a notice to be affixed in the factory or workshop the conditions of employment so fixed (*n*).

A change in the conditions is not to be made until the occupier has served on an inspector and affixed in the factory or workshop notice of his intention to make it. Unless for special cause allowed in writing by an inspector, such change is not to be made oftener than once a quarter. An inspector may, by notice in writing, name a public clock, or some other clock open to public view, for the purpose of regulating the period of employment and meal times (*o*).

Meal times.

1129. All women, young persons, and children employed in a factory or workshop (other than a domestic factory or domestic workshop (*p*)) are to have their meal times simultaneously (*q*); and they may not be employed in the factory or workshop, nor allowed

(*a*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 31 (1), (2).
(*b*) *Ibid.*, s. 31 (3).
(*c*) As to employment in shops, see p. 509, *post*.
(*d*) See note (*n*); *infra*.
(*e*) See p. 525, *post*.
(*f*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 31 (4).
(*g*) *Ibid.*, s. 31 (5). As to the penalty, see p. 533, *post*. Special exceptions to these provisions may be granted by special order; see p. 508, *post*.
(*h*) For definition, see p. 441, *ante*.
(*i*) For definition, see p. 442, *ante*.
(*k*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 111 (4).
(*l*) See pp. 490—494, *ante*.
(*m*) See p. 492, *ante*.
(*n*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 32 (1), (2). As to tenement factories, see p. 526, *post*.
(*o*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 32 (3), (4).
(*p*) *Ibid.*, s. 111 (4).
(*q*) *Ibid.*, s. 33. See also *Rogers* v. *Barlow & Son* (1906), 94 L. T., 519. See p. 505, *post*, as to special exceptions.

SECT. 2. General Provisions as to Hours etc.

to remain in a room in which a manufacturing process is being carried on, during any part of the meal times (*r*).

Employment contrary to the Act.

1130. If a woman, young person, or child is not allowed times for meals and absence from work as prescribed (*a*), or during any part of such times is employed in the factory or workshop or allowed to remain in any room (*b*), she or he will be deemed to be employed contrary to the provisions of the Acts (*c*).

Annual holidays and half holidays.

1131. The occupier of a factory or workshop (domestic factories and domestic workshops excepted (*d*)) is to allow in each year to every woman, young person, and child employed therein, whole holidays on Christmas Day, Good Friday, and every bank holiday (*e*), or in lieu of any of those days, another whole holiday or two half holidays to be fixed by the occupier, at least half of which must be between 15th March and 1st October in each year (*f*). A half holiday is to comprise at least one half of the period of employment for women and young persons on some day other than Saturday or a day substituted for Saturday (*f*).

Notice to inspector.

Except in the case of Christmas Day, Good Friday, or a bank holiday, a notice of every whole or half holiday is to be affixed in the factory or workshop during the first week in January, and a copy thereof is to be forwarded to the district inspector on the same day (*g*). If such notice is not so affixed and sent, cessation from work will not be deemed to be a whole or half holiday (*h*). Any such notice may be changed by a subsequent notice affixed and sent in like manner not less than fourteen days before the holiday or half holiday to which it applies (*h*). Employment on a whole or half holiday so fixed will be deemed to be employment contrary to the provisions of the Acts (*i*), and if whole or half holidays are not so fixed the occupier of the factory or workshop will be liable to a fine not exceeding £5 (*k*).

General restrictions as to employment of children.

1132. A person under fourteen years of age must not be employed between 9 p.m. and 6 a.m. in any labour exercised by way of trade or for purposes of gain (*l*), whether the gain be to the child or to

(*r*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 33. See p. 505, *post*, as to special exceptions.

(*a*) See pp. 490—494, *ante*, and pp. 499, 505, *post*.

(*b*) See note (*a*), *supra*.

(*c*) Factory and Workshop Act, 1901 (1 Edw. 7, c 22), s. 137 (2). As to penalty, see p. 533, *post*.

(*d*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 111 (4).

(*e*) For definition, see p. 446, *ante*.

(*f*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 35. For Scotland and Ireland other days are appointed (*ibid.*). There are special exceptions in the case of fish and fruit preserving (see p. 506, *post*); in the case of the creameries included in a special Order (see p. 507, *post*); and in the case of male young persons employed in day and night turns (see p. 502, *post*).

(*g*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 35.

(*h*) *Ibid.*, s. 33. A special exception allows the Secretary of State, by special Order, to allow, in particular classes of factories or workshops, holidays to be taken on different days by different sets; see p. 507, *post*.

(*i*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 33. As to the penalty, see p. 533, *post*.

(*k*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 33. As to recovery of fines, see p. 535, *post*.

(*l*) For the meaning of this expression, see note (*r*), p. 437, *ante*.

any other person; nor may any such person be so employed in any other occupation if he is employed half-time in any factory or workshop (*m*). The penalty is a fine not exceeding 40*s.*, or for a subsequent offence £5 (*n*). The information must be laid within three months after the commission of the offence (*o*).

SECT. 3.—*Special Exceptions as to Hours, Meal-times, and Holidays in Factories and Workshops.*

SUB-SECT. 1.—*General Provisions.*

Notices, registers etc.

1133. The occupier (*p*) of a factory or workshop (domestic factories and domestic workshops excepted (*q*)) who intends to avail himself of any special exception as to hours and holidays must, not less than seven days previously, serve on the district inspector, and affix and keep affixed in his factory or workshop, notice of such intention (*r*). The notice must specify the hours at which the period of employment begins and ends, and the times to be allowed to every woman, young person, and child for meals (*s*) where they differ from the ordinary hours or times (*t*).

Before the service of the notice on the inspector the special exceptions will not be deemed to apply; and, after such service, the occupier may not prove that the exception does not apply to his factory or workshop, unless he has previously served on the inspector notice that he no longer intends to avail himself thereof (*u*). In the case of factories and workshops other than domestic factories and domestic workshops (unless prescribed by the Secretary of State (*a*)), the occupier is to enter in the prescribed register (*b*) and report to the district inspector the prescribed particulars respecting employment in pursuance of a special exception (*c*). In the case of overtime employment (*d*) there must also be kept affixed for the

(*m*) Employment of Children Act, 1903 (3 Edw. 7, c. 45), ss. 3, 13.

(*n*) *Ibid.*, s. 5. As to fitness of children for employment, see p. 487, *ante*. The Act also contains provisions (s. 6) similar to those contained in the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), ss. 140, 141, by which a person committing an offence for which the employer is liable may be fined, and enabling the employer to exempt himself from any penalty by convicting the actual offender, but the convicted person cannot be ordered to pay costs; see p. 534, *post*. The same section provides for the punishment of a parent falsely representing a child's age for the purpose of employment, and see, further, title INFANTS AND CHILDREN.

(*o*) Employment of Children Act, 1903 (3 Edw. 7, c. 45), s. 7.

(*p*) In the case of tenement factories or workshops, the owner; see p. 526, *post*.

(*q*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 111 (4).

(*r*) *Ibid.*, s. 60 (1). The provisions of the section apply to laundries (Factory and Workshop Act, 1907 (7 Edw. 7, c. 39), s. 2); and see p. 525, *post*. As to tenement factories, see p. 526, *post*.

(*s*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 60 (3). There are special exceptions in favour of fish and fruit preserving (p. 500, *post*), and laundries (p. 504, *post*).

(*t*) See pp. 490 *et seq.*, *ante*.

(*u*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 60 (2).

(*a*) *Ibid.*, s. 111 (2).

(*b*) See p. 525, *post*.

(*c*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 60 (4).

(*d*) See p. 498, *post*.

SECT. 3. Special Exceptions as to Hours etc.

prescribed time in the factory or workshop a notice containing the prescribed particulars respecting the employment, and the above-mentioned report must be sent to the inspector not later than 8 o'clock in the evening on which such overtime employment takes place (*e*). In laundries (*f*) the entry in the register must be made on each day before the commencement of the employment (*g*). The report served on the inspector is, unless withdrawn, *primâ facie* evidence that there was in fact such overtime employment (*h*).

When there is attached to the special exception a condition relating to cleanliness, ventilation, or overcrowding, the factory or workshop in which such condition is not observed will be deemed not to be kept in conformity with the Acts (*i*). In the case of non-observance of any other conditions there will be deemed to be employment contrary to the Acts (*k*).

Conditions of special exceptions.

1134. When it appears to the Secretary of State that the adoption of any special means or provision, either for the cleanliness or ventilation of a factory or workshop, or as to the total number of hours of employment in each week, the periods of employment, and the intervals between such periods, is required for the protection of the health of women, young persons, or children employed in pursuance of a special exception, he may, by special Order, direct the adoption of such means or provision as a condition of such employment (*l*).

Power to rescind Order.

1135. The Secretary of State may, without prejudice to the subsequent making of another Order, rescind, by special Order, any exception, if it appears to be injurious to the health of the women, young persons, or children employed thereunder, or is no longer necessary for the carrying on of the business concerned (*m*).

SUB-SECT. 2.—*Overtime.*

Overtime.

1136. In the following non-textile factories and workshops and parts thereof (*n*) (other than women's workshops or parts thereof (*o*)), the period of employment (*p*) for women on any day except Saturday, or any day substituted for Saturday (*q*), may be between 6 a.m. and 8 p.m., or 7 a.m. and 9 p.m., or 8 a.m. and 10 p.m.:—

Nature of material.

(1) Where the material is liable to be spoiled by weather; namely, flax scutch mills; any non-textile factory or workshop or part thereof in which is carried on the making or finishing of bricks (*r*) or tiles,

(*e*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 60 (4).
(*f*) See p. 504, *post*.
(*g*) Factory and Workshop Act, 1907 (7 Edw. 7, c. 39), s. 2 (2).
(*h*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 60 (6).
(*i*) *Ibid.*, s. 60 (5). For the penalty, see p. 531, *post*.
(*k*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22). For the penalty, see p. 533, *post*.
(*l*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 58.
(*m*) *Ibid.*, s. 59.
(*n*) *Ibid.*, s. 49 (1), (2), and Sched. II.
(*o*) For definition, see p. 443, *ante*; and as to hours of employment therein, see p. 493, *ante*.
(*p*) For definition, see p. 446, *ante*.
(*q*) See p. 507, *post*.
(*r*) For the meaning of this term, see note (*e*), p. 477, *ante*.

not being ornamental tiles; the part of rope works (*s*) in which is carried on the open-air process; the part of bleaching and dyeing works (*t*) in which is carried on open-air bleaching or Turkey red dyeing; and any non-textile factory or workshop or part thereof in which is carried on glue making.

Press of work.

(2) Where press of work arises at certain recurring seasons of the year—namely, letterpress printing works, bookbinding works, and any non-textile factory or workshop, or part thereof, in which is carried on lithographic printing, machine ruling, firewood cutting, bon-bon and Christmas present making, almanac making, valentine making, envelope making, aërated water making, or playing card making.

Sudden press of orders.

(3) Where the business is liable to sudden press of orders arising from unforeseen events—namely, any non-textile factory or workshop or part thereof where is carried on the making up of any article of wearing apparel or of furniture hangings; artificial flower making, fancy box making, biscuit making, or job dyeing.

Cleaning and packing.

(4) Any part of a factory (whether textile or non-textile) or workshop which is a warehouse (*a*) not used at any time (*b*) for any manufacturing process or handicraft, and in which persons are solely employed in polishing, cleaning, wrapping or packing up goods.

Meals.

Such employment is subject to the conditions that there shall be allowed to every woman for meals during the period of employment (*c*) not less than two hours, of which half an hour must be after 5 p.m.; that such woman shall not be so employed for more than three days in any one week (*d*); and that such employment shall not take place on more than thirty days in any twelve months, and, in reckoning that period of thirty days, every day on which any woman has been employed overtime is to be taken into account (*e*).

Special extension orders.

1137. Where it is necessary, by reason of the material being liable to be spoiled by weather, or by reason of press of work arising at certain recurring seasons of the year, or by reason of the liability of the business to a sudden press of orders arising from unforeseen events, and if such employment will not injure the health of the women concerned, the Secretary of State may by special Order (*f*)

(*s*) For definition, see p. 440, *ante*.
(*t*) For definition, see p. 438, *ante*.
(*a*) See note (*e*), p. 483, *ante*.
(*b*) *Smith* v. *Sibray, Hall & Co.*, [1903] 2 K. B. 707 (*per* WILLS, J., at p. 712): "I think . . . that the warehouse in which overtime is worked is not to be used at any time for other purposes than those of polishing, cleaning, wrapping, and packing up."
(*c*) For definition, see p. 446, *ante*.
(*d*) For definition, see p. 446, *ante*.
(*e*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 49 (1).
(*f*) This special exception has been extended (subject to special conditions) to non-textile factories and workshops or parts thereof, in which are carried on the following processes or any of them, namely:—Making cardboard and millboard; colouring and enamelling of paper, other than wall papers; stamping in relief on paper and envelopes; making postage stamps, stamped postcards, and stamped envelopes; making Christmas and New Year cards and cosaques; making meat pies, mincemeat, and Christmas puddings; bottling beer; making boxes for

SECT. 3. **Special Exceptions as to Hours etc.**

extend the above exception to any class of non-textile factories or workshops or parts thereof (*g*).

Perishable articles.

1138. In factories and workshops, or parts thereof, in which is carried on the process of making preserves from fruit, or of preserving or curing fish, or of making condensed milk, the period of employment (*h*) for women on any day except Saturday, or any day substituted for Saturday (*i*), may be between 6 a.m. and 8 p.m. or between 7 a.m. and 9 p.m. (*k*). Such employment is subject to the same conditions as in the case of overtime for press of work (*l*), save that the number of days on which overtime is allowed in any one year is fifty (*k*). The Secretary of State may by special Order (*m*) extend this exception to any class of non-textile factories or workshops, or parts thereof, if it is necessary by reason of the perishable nature of the articles or materials worked upon, and if such employment will not injure the health of the women concerned (*n*).

Incomplete processes.

1139. The period of employment (*o*) of a woman, young person, or child on any day except Saturday, or any day substituted for Saturday (*p*), may be extended for a period not exceeding thirty minutes in the case of bleaching and dyeing works (*q*), and print works (*r*), also in the case of iron mills (*s*), foundries (*t*) and paper mills (*a*) in which male young persons are not employed during any part of the night (*b*), if the process in which such woman, young person, or child is employed is in an incomplete state at the end of their respective periods of employment (*c*). Such further periods of employment must not, however, raise above the number otherwise allowed (*c*) the total number of hours of employment of the woman, young person, or child in that week (*d*).

aërated water bottles; washing bottles for use in preserving fruit; making and mixing butter and making cheese; making fireworks; calendering, finishing, hooking, lapping, or making up and packing any yarn or cloth (provided that in Lancashire and Cheshire this exception is not to apply unless such processes are the only processes carried on in the factory); warping, winding, or filling yarn, without the aid of mechanical power, as incidental to the weaving of ribbons; making up any article of table linen, bed linen, or other household linen, and processes incidental thereto; and making bouquets or wreaths or similar articles from natural flowers or leaves, or processes in which natural flowers or leaves are otherwise adapted for sale (Order of 13th October, 1908 [1908—No. 809]): see also Order of 27th March, 1897, note (*u*), p. 443, *ante;* and as to overcrowding, p. 448, *ante.*

(*g*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 49 (3).
(*h*) For definition, see p. 446, *ante.*
(*i*) See p. 507, *post.*
(*k*) Factory and Workshop Act, 1901 (1 Edw, 7, c. 22), s. 50 (1), (2).
(*l*) See p. 499, *ante.*
(*m*) No order under this provision is yet in force.
(*n*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 50 (3).
(*o*) For definition, see p. 446, *ante.*
(*p*) See p. 507, *post.*
(*q*) For definition, see p. 438, *ante.*
(*r*) For definition, see p. 438, *ante.*
(*s*) For definition, see p. 439, *ante.*
(*t*) For definition, see p. 439, *ante.*
(*a*) For definition, see p. 439, *ante.*
(*b*) For definition, see p. 446, *ante.* As to night work, see p. 501, *post.*
(*c*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 51 (1), (2).
(*d*) For definition, see. p. 446, *ante.*

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The Secretary of State may by special Order (*e*) extend this exception to any classes of non-textile factories or workshops, or parts thereof (*f*), if the time for the completion of a process cannot be accurately fixed, and if such employment will not injure the health of the women, young persons, and children affected thereby.

Factories driven by water power.

1140. Where it appears to the Secretary of State that factories driven by water power are liable to be stopped by drought or flood he may, by special order (*g*), grant to them a special exception permitting the employment of women and young persons from 6 a.m. until 7 p.m. on such conditions as he thinks proper; but no person may be deprived of the prescribed meal times (*h*), nor be so employed on Saturday or any day substituted for Saturday (*i*), and the exception must not extend to more than ninety-six days in any twelve months in factories liable to be stopped by drought, or to more than forty-eight days in any twelve months in factories liable to be stopped by floods (*k*). In no case is such overtime to extend beyond the time lost during the previous twelve months (*k*).

Turkey red dyeing and open air bleaching.

1141. A woman or young person may, on any day except Saturday, or any day substituted for Saturday (*l*), be employed beyond the period of employment, so far as is necessary for preventing damage from spontaneous combustion in Turkey red dyeing or from any extraordinary atmospheric influence in open-air bleaching (*m*).

Laundries.

1142. In certain laundries the period of employment for women may be from 6 a.m. to 7 p.m., or 7 a.m. to 8 p.m., or 8 a.m. to 9 p.m., on four days a week (except Saturday), but on not more than sixty days in the year (*n*).

SUB-SECT. 3.—*Night Work.*

Night employment of males not under fourteen.

1143. In blast furnaces (*o*), iron mills (*p*), letter-press printing works (*q*), and paper mills (*r*), a male young person (*a*) of fourteen years of age and upwards may be employed during the night (*b*), subject to the following conditions (*c*): the period of employment (*d*)

(*e*) No order under this provision is at present in existence.
(*f*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 51 (3).
(*g*) This exception (subject to special conditions) has been granted to factories in which water power alone is used to move the machinery (Order of 20th December, 1882).
(*h*) See p. 490, *ante*.
(*i*) See p. 507, *ante*.
(*k*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 52.
(*l*) See p. 507, *post*.
(*m*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 53.
(*n*) Factory and Workshop Act, 1907 (7 Edw. 7, c. 39), s. 2 (1); see further hereon, p. 504, *post*.
(*o*) For definition, see p. 439, *ante*.
(*p*) For definition, see p. 439, *ante*.
(*q*) For definition, see p. 439, *ante*.
(*r*) For definition, see p. 439, *ante*.
(*a*) For definition, see p. 445, *ante*.
(*b*) For definition, see p. 446, *ante*.
(*c*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 54 (1), (3).
(*d*) For definition, see p. 446, *ante*.

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must not exceed twelve consecutive hours, and must begin and end at the hour specified in the prescribed notice (*e*); the provisions as to meal times (*f*) must be observed with the necessary modifications; a young person employed during any part of the night must not be employed during any part of the twelve hours preceding or succeeding the period of employment; he must not be employed on more than six nights or, in the case of blast furnaces or paper mills, seven nights in any two weeks (*g*) (but a male young person may be employed in three shifts of not more than eight hours each, if there is an interval of two unemployed shifts between each two shifts of employment); and, in the case of blast furnaces, iron mills, letter-press printing works, or paper mills, he may only be employed during the night in a process incidental to the business of the factory (*h*). The provisions as to the period of employment on Saturday (*i*) and the allowance to young persons of whole or half holidays (*k*) are not to apply to a male young person employed in day and night turns in pursuance of this exception (*l*). Nothing in these provisions is to prevent the employment of young persons in three shifts, for not more than eight hours each, in quarries (*m*).

Males not under sixteen.

If in any class of non-textile factories or workshops, or parts thereof, the Secretary of State is satisfied that it is necessary for any process to be carried on throughout the night (*n*), and for male young persons of sixteen years of age and upwards to be employed therein, and that such employment will not injure their health, he may by special Order (*o*) extend this exception accordingly (*p*).

(*e*) See p. 497, *ante*.
(*f*) See p. 492, *ante*.
(*g*) For definition, see p. 446, *ante*.
(*h*) *I.e.*, "as described in Part I. of the Sixth Schedule to this Act." See definitions of non-textile factories, p. 437, *ante*.
(*i*) See p. 492, *ante*.
(*k*) See p. 496, *ante*.
(*l*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 54 (2).
(*m*) Quarries Act, 1894 (57 & 58 Vict. c. 42), s. 3.
(*n*) For definition, see p. 446, *ante*.
(*o*) This exception has been extended to electrical stations (subject to the special conditions mentioned in the Order) (Order of 11th March, 1903 [1903—No. 187]); to that part of a factory in which reverberatory or regenerative furnaces are used and are necessarily kept in operation day and night to avoid waste of material or fuel; to the knocking out and cutting departments of factories engaged in the refining of loaf sugar; to the process of galvanising sheet metal and wire in factories; to such parts of mineral dressing floors in Cornwall as are appropriated to the processes of calcining and stamping; and to china clay works, and factories and workshops connected with lead and zinc mines in which the concentration of the ores is carried on (Order of 4th May, 1903 [1903—No. 363]); to male young persons of sixteen years of age and upwards employed on the system of three shifts of not more than eight hours each in the processes of pressing and reeling cordite and nitrating and moulding gun cotton carried on in non-textile factories (Order of 9th August, 1904 [1904—No. 1429]); to the process of continuous wire drawing carried on in non-textile factories (Order of 18th February, 1905 [1905—No. 108]).
(*p*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 54 (4).

Glass works.

1144. In glass works (*q*) a male young person (*r*) of fourteen years of age and upwards may work according to the accustomed hours of the works, subject to the conditions that the total number of hours of employment shall not exceed sixty in any one week (*s*); that the periods of employment shall not exceed fourteen hours in four separate turns per week, or twelve hours in five separate turns per week, or ten hours in six separate turns per week, or any less number of hours in the accustomed number of separate turns per week, so that the number of turns do not exceed nine; that he shall not work in any turn without an interval of not less than one full turn; that he shall not be employed continuously (*t*) for more than five hours without an interval of at least half an hour for a meal, and that he shall not be employed on Sunday (*a*).

Printing newspapers.

1145. In a factory or workshop in which the process of printing newspapers is carried on on not more than two nights (*b*) in the week (*c*), a male young person (*d*) above the age of sixteen may be employed at night during not more than two nights in a week as if he were no longer a young person; but he must not be so employed more than twelve hours in any consecutive period of twenty-four hours (*e*).

SUB-SECT. 4.—*Miscellaneous.*

Employment between 9 a.m. and 9 p.m.

1146. The Secretary of State may by special Order (*f*) grant to any class of non-textile factories (*g*) or workshops (*h*) or parts thereof, either generally or when situate in any particular locality, a special exception that the period of employment for women (*i*) or young persons (*k*) therein may, on any day except Saturday, begin at 9 a.m. and end at 9 p.m. (in which case the period of employment for a child (*l*) in a morning set (*m*) is to begin at 9 a.m., and in an afternoon set to end at 8 p.m.), if it is proved to his satisfaction that the customs or exigencies of the trade carried on therein require that such exception should be granted, and that it can be granted without injury to the health of the women, young persons, and children affected thereby (*n*).

(*q*) For definition, see p. 439, *ante*.
(*r*) For definition, see p. 445, *ante*.
(*s*) For definition, see p. 446, *ante*.
(*t*) For definition, see p. 446, *ante*.
(*a*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 55.
(*b*) For definition, see p. 446, *ante*.
(*c*) For definition, see p. 446, *ante*.
(*d*) For definition, see p. 445, *ante*,
(*e*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 56.
(*f*) This special exception has been granted to factories in the county of London in which letterpress bookbinding is carried on, and to laundries in the county of London and certain of the surrounding urban and rural districts (for which see the special Order), subject to the conditions mentioned in the Order (Order of 26th December, 1907 [1907—No. 1009]).
(*g*) For definition, see p. 437, *ante*.
(*h*) For definition, see p. 441, *ante*.
(*i*) For definition, see p. 445, *ante*.
(*k*) For definition, see p. 445, *ante*.
(*l*) For definition, see p. 445, *ante*.
(*m*) See p. 493, *ante*.
(*n*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 36.

SECT. 3. **Special Exceptions as to Hours etc.**

Period of employment in laundries.

1147. In laundries (*o*), other than laundries ancillary to another factory or workshop, the period of employment of women may on any three days in the week, other than Saturday, begin at 6 a.m. and end at 7 p.m., or begin at 7 a.m. and end at 8 p.m., or begin at 8 a.m. and end at 9 p.m., provided that a corresponding reduction is made in the periods of employment on other days of the week, so that the total number of hours of employment of women, including the intervals allowed for meals, shall not exceed sixty-eight in any one week (*p*). Where the occupier of a laundry so elects, the period of employment of women may, instead, on not more than four days, other than Saturday, in any week (*q*), and on not more than sixty days in any year (every day on which any woman has been employed overtime being taken into account), begin at 6 a.m. and end at 7 p.m., or begin at 7 a.m. and end at 8 p.m., or begin at 8 a.m. and end at 9 p.m. (*p*), but the change from one system to the other may not be made oftener than once a year. Different periods of employment may be fixed for different days of the week (*r*).

Lace factories.

1148. In the part of a textile factory (*s*) in which a machine for the manufacture of lace is moved by mechanical power (*t*), the period of employment for any male young person (*a*) above the age of sixteen may be between 4 a.m. and 10 p.m. if he is employed subject to the following conditions—namely, where he is employed on any day before the beginning or after the end of the ordinary period of employment he must be allowed not less than nine hours for meals and absence from work between the above-mentioned hours; he must not be employed both before and after the ordinary period of employment on the same day, nor after that period on one day and before it on the next. The "ordinary period of employment" means the period of employment for women or young persons under the age of sixteen in the factory, or, if none are employed, such period as can be fixed under the Acts for their employment (*b*), and notice of such period must be affixed in the factory (*c*).

Bakehouses.

1149. In the part of a bakehouse (*d*) in which the process of baking bread is carried on, the period of employment for any male young person above sixteen may be between 5 a.m. and 9 p.m., subject to the same conditions which obtain in lace factories (*e*), save that the

(*o*) See p. 504, *ante*.
(*p*) Factory and Workshop Act, 1907 (7 Edw. 7, c. 39), s. 2. For definition of "week," see p. 446, *ante*. As to the entry in the register in the case of overtime employment under this provision, see p. 498, *ante*.
(*q*) For definition, see p. 446, *ante*.
(*r*) Factory and Workshop Act, 1907 (7 Edw. 7, c. 39), s. 2. The provisions of this section are "special exceptions," as to which see p. 497, *ante*.
(*s*) For definition, see p. 436, *ante*.
(*t*) See p. 436, *ante*.
(*a*) For definition, see p. 445, *ante*.
(*b*) See p. 490, *ante*.
(*c*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 37.
(*d*) For definition, see p. 440, *ante*.
(*e*) See par. 1148, *supra*.

time allowed for meals and absence from work between the period of employment is not less than seven hours (*f*).

SECT. 3. Special Exceptions as to Hours etc.

1150. In textile factories (*g*) solely used for the making of elastic web, or ribbon, or trimming, a woman, young person, or child may, between 1st November and 31st March following, be employed continuously for five hours without an interval for a meal, provided that the period of employment fixed by the occupier and specified in the notice (*h*) begins at 7 a.m., and that the whole time between that hour and 8 o'clock is allowed for meals (*i*). The limitation of the exception to the period between 1st November and 31st March following is not to apply to hosiery factories if the Secretary of State by special Order (*k*) so directs (*l*). The exception may be extended by special Order (*m*) to any class of textile factories, either generally or when situate in any particular locality, if it is proved that the customary habits of the persons employed therein require such extension, and that the manufacturing process there carried on is of a healthy character, and that the extension will not injure the health of those affected thereby (*l*).

Five hours' spell.

1151. The requirement that all the women, young persons, and children employed in a factory or workshop are to have their meal times simultaneously (*n*) does not apply to blast furnaces (*o*), iron mills (*p*), paper mills (*q*), glass works (*r*), or letter-press printing works (*s*); and the requirement that they shall not during the times allowed for meals be employed or allowed to remain in a room in which a manufacturing process or handicraft is being carried on (*t*) does not apply to iron mills, paper mills, glass works (except any part in which the materials are mixed and, in the case of glass works where flint glass is made, any part in which the work of grinding, cutting or polishing is carried on), or letter-press printing works. In that part of any print works (*a*) or bleaching and dyeing works (*b*) in which dyeing or open-air bleaching is carried on, a male young person

Different meal times and employment during meal times.

(*f*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 38.
(*g*) For definition, see p. 436, *ante*.
(*h*) See p. 497, *ante*.
(*i*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 39 (1), (2).
(*k*) Such direction is made by Order of 12th May, 1902 [1902—No. 379].
(*l*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 39 (3).
(*m*) The exception has been extended to woollen factories in Oxford, Wilts, Worcester, Gloucester, and Somerset, and to factories in which the only processes carried on are winding and throwing raw silk or either of them (Order of 20th December, 1882); and to hosiery factories, but only during such period of the year as is specified in the notice (Order of 12th May, 1902 [1902—No. 379]).
(*n*) See p. 495, *ante*.
(*o*) For definition, see p. 439, *ante*.
(*p*) For definition, see p. 439, *ante*.
(*q*) For definition, see p. 439, *ante*.
(*r*) For definition, see p. 439, *ante*.
(*s*) For definition, see p. 439, *ante*.
(*t*) See p. 496, *ante*.
(*a*) For definition, see p. 438, *ante*.
(*b*) For definition, see p. 438, *ante*.

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may have the times allowed him for meals at different hours from other young persons and women and children employed in the factory; he may, during the time allowed for meals to any other young person or to any woman or child, be employed or allowed to remain in a room in which a manufacturing process is carried on; and, during his meal times, any other person may be so employed or remain (*c*).

Extension of exception.

The exception (1) permitting meal times at different hours, or (2) that permitting employment in the factory or workshop, or presence in a room in which a manufacturing process or handicraft is being carried on during meal times, or both such exceptions, may be extended by the Secretary of State by special Order (*d*) to any class of factories or workshops, or parts thereof, if it is proved to his satisfaction that such extension is necessary, by reason of the continuous nature of the process or of special circumstances affecting that class, and that it can be made without injury to the health of those affected thereby (*e*).

Fish and fruit preserving.

1152. The provisions as to period of employment (*f*), times for meals (*g*), and holidays (*h*) do not apply to young persons and women engaged in processes in the preserving and curing of fish which must be carried out immediately on the arrival of the fishing boats in order to prevent the fish from being destroyed or spoiled (*i*), or in the process of cleaning and preparing fruit so far as is necessary to prevent the spoiling of the fruit immediately on its arrival at a factory or workshop during June,

(*c*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 40 (1), (2), (3); and see p. 495, *ante*.

(*d*) By various Orders one or both of these exceptions have been extended to the following places, persons, and trades, subject, in most cases, to special conditions:—

Textile factories wherein female young persons or women employed in a distinct department, in which there is no machinery, commence work later than the men and other young persons; non-textile factories and workshops wherein there are two or more departments or sets of young persons; non-textile factories and workshops wherein is carried on the making of wearing apparel; and dressing floors, tin streams, china clay pits, and quarries in Cornwall (Order of 20th December, 1882).

Non-textile factories wherein is carried on the making of bread or biscuits by means of travelling ovens (Order of 24th February, 1887).

Factories and workshops in which is carried on the printing of photographs (Order of 1st May, 1896 [1896—No. 330]).

Factories in which is carried on the spinning of artificial silk (Order of 20th July, 1899 [1899—No. 550]).

Textile factories in which the material used is flax, jute, or hemp (Order of 6th September, 1899 [1899—No. 674]).

Young persons above the age of sixteen employed in electrical stations (Order of 11th March, 1903 [1903—No. 188]).

Male young persons employed in iron and steel foundries (Order of 23rd June, 1904 [1904—No. 1220]).

Women and young persons employed in florists' workshops (Order of 13th October, 1908 [1908—No. 807]).

(*e*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 40 (4).

(*f*) See p. 492, *ante*.

(*g*) See p. 492, *ante*.

(*h*) See p. 496, *ante*.

(*i*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 41 (1).

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July, August, and September; but this exception is subject to such conditions as the Secretary of State may by special Order (*k*) prescribe (*l*). In these cases the notices of the exception (*m*) need not specify the hours for the beginning and end of the period of employment or the times to be allowed for meals (*n*).

Creameries.

1153. In creameries where women and young persons are employed, the Secretary of State may by special Order (*o*) vary the beginning and end of their daily period of employment (*p*) and the times allowed for their meals (*q*), and allow employment on Sundays and holidays for not more than three hours, but so that there is no excess over either the daily or weekly maximum number of hours of employment (*r*) allowed (*s*).

Substitution of another day for Saturday.

Newspaper offices.

Turkey red dyeing.

1154. Where the customs or exigencies of the trade carried on in any class of non-textile factories or workshops, either generally or in any particular locality, require some other day to be substituted for Saturday as regards the hour on that day at which the period of employment for women, young persons, and children is required to end (*t*), the Secretary of State may by special Order (*a*) grant a special exception authorising the occupier to substitute by a notice affixed in his factory or workshop some other day for Saturday (*b*). In the case of newspaper printing offices he may by such Order authorise such substitution in respect of some of the young persons therein employed (*c*). In the process of Turkey red dyeing the period of employment for women and young persons on Saturday (*d*) may extend until 4.30 p.m., but the week's limit of work (*e*) must not be exceeded (*f*).

Holidays on different days.

1155. For the same reasons the Secretary of State may by special Order (*g*) grant to any class of non-textile factories or

(*k*) Conditions for this exception have been prescribed (Order of 11th September, 1907 [1907—No. 728]).

(*l*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 41 (1).

(*m*) See p. 497, *ante*.

(*n*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 41 (2).

(*o*) Many variations have been made and conditions imposed (Order of 23rd October, 1903 [1903—No. 893]).

(*p*) See p. 492, *ante*.

(*q*) See p. 492, *ante*.

(*r*) See pp. 492, 493, *ante*.

(*s*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 42.

(*t*) See p. 492, *ante*.

(*a*) This exception has been granted to non-textile factories in which is carried on the printing of newspapers, periodicals, railway time tables, or law or parliamentary proceedings; to non-textile factories and workshops in which is carried on any manufacturing process or handicraft in connection with a retail shop on the same premises, or the making of any article of wearing apparel or food, or in places in which the market day is Saturday, or in which a special day has been set apart for a weekly half holiday; and to laundries (Order of 26th December, 1907 [1907—No. 1008]).

(*b*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 43.

(*c*) *Ibid.* This exception is granted subject to conditions (Order of 3rd February, 1902 [1902—No. 59]).

(*d*) See p. 492, *ante*.

(*e*) See p. 492, *ante*.

(*f*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 44.

(*g*) This exception has been granted to non-textile factories in which is

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workshops, either generally or in any particular locality, a special exception authorising the occupier to allow all or any of the annual whole holidays or half holidays (*h*) on different days to any of the women, young persons, and children, or to any sets thereof, employed in his factory or workshop (*i*).

Employment inside and outside on same day.

For the same reasons, and in the same way, any class of factories or workshops or parts thereof may be excepted from the provisions (*k*) relating to employment inside and outside a factory or workshop on the same day (*l*).

Jewish factories or workshops.

1156. Where the occupier of a factory or workshop is a person of the Jewish religion he may, if he keeps his factory or workshop closed on Saturday until sunset, employ women and young persons on Saturday from after sunset until 9 p.m.; or, if he keeps his factory or workshop closed on Saturday both before and after sunset, he may employ women and young persons one hour on every other day in the week (not being Sunday), in addition to the hours allowed by law (*m*), so that such hour be at the beginning or end of the period of employment and be not before 6 a.m or after 9 p.m. (*a*). If he does not avail himself of this exception he may employ a woman or young person of the Jewish religion on Sunday, but the factory or workshop must be closed on Saturday and must not be opened for traffic on Sunday (*b*). A factory or workshop is not considered to be open for traffic merely because customers deliver or fetch away things in pursuance of arrangements made on a previous day (*c*).

Open for traffic.

Substitution of Saturday for Sunday.

Where the occupier avails himself of this exception the provisions respecting Sunday (*d*) apply as if Saturday were substituted for Sunday, and as if in the provisions respecting Saturday the word Sunday, or, if the occupier so specify in the notice (*e*), the word Friday, were substituted for Saturday (*f*).

Institutions.

1157. If the managers of any charitable or reformatory institution, not subject to Government inspection, wherein manual labour is exercised in or incidentally to the making, altering, repairing, ornamenting, finishing, washing, cleaning, or adapting for sale, of

carried on the printing of newspapers, periodicals, railway time tables, or law or parliamentary proceedings, and those in which is carried on the manufacture of plate glass; to non-textile factories and workshops in which any manufacturing process or handicraft is carried on in connection with a retail shop on the same premises, and those in which is carried on the making of any article of wearing apparel or food (Order of 20th December, 1882).

(*h*) See p. 496, *ante*.
(*i*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 45.
(*k*) See p. 494, *ante*.
(*l*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 46. No Order is at present in force.
(*m*) See pp. 490, 492, *ante*.
(*a*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 47.
(*b*) *Ibid.*, s. 48.
(*c*) *Goldstein* v. *Vaughan*, [1897] 1 Q. B. 549.
(*d*) See p. 490, *ante*.
(*e*) See p. 497, *ante*.
(*f*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 48.

articles not intended for the use of the institution, satisfy the Secretary of State that the only persons working therein are inmates of and supported by the institution, or persons engaged in the supervision of the work or the management of machinery, and that such work is carried on in good faith for the purposes of the support, education, training, or reformation of persons engaged in it, he may by Order allow the managers to submit to him a scheme for the regulation of the hours, meal times, and holidays of the workers; and if such scheme is not less favourable than the general law as to factories and workshops, he may approve it. Schemes so approved must be laid before Parliament, and either House may, within forty days, annul them (*g*). Particulars of the scheme are to be shown in the general register (*h*).

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SECT. 4.—*Hours of Employment in Shops.*

1158. No person under the age of eighteen years (*i*) may be employed in or about a shop (*k*) more than seventy-four hours, including meal times, in any one week (*l*). If any such person has, to the knowledge of his employer, been employed in any factory or workshop, he may not be employed in or about a shop on the same day for a longer period than will, together with the previous employment, complete the number of hours permitted in the factory or workshop (*m*).

Hours of employment for persons under eighteen.

The employer is liable to a fine not exceeding £1 for each person employed contrary to the foregoing provisions (*n*); but if the offence was committed without his knowledge, he may be exempted from any penalty on conviction of the actual offender (*o*).

Penalty.

Exemption.

(*g*) Factory and Workshop Act, 1907 (7 Edw. 7, c. 39), s. 5 (2) (a).

(*h*) *Ibid.*, s. 5 (2) (c); "or where no scheme is in force the prescribed particulars as to hours of employment, intervals for meals, holidays, education of children, and other matters dealt with in the principal Act" (*ibid.*). As to the general register, see p. 525, *post*. As to returns of inmates etc., see p. 526, *post*; as to inspection in institutions, see p. 529, *post*.

(*i*) Shop Hours Act, 1892 (55 & 56 Vict. c. 62), s. 9. The Shop Hours Acts, 1892—1895, the Seats for Shop Assistants Act, 1899, and the Shop Hours Act, 1904, may be cited together as the Shops Regulation Acts, 1892—1904 (Shop Hours Act, 1904 (4 Edw. 7, c. 31), s. 10).

(*k*) For definition of "shop," see p. 510, *post*. Work done at a place remote from the shop may be employment "in or about a shop," if it is for the purposes of the shopkeeper's business (*Collman* v. *Roberts*, [1896] 1 Q. B. 457).

(*l*) Shop Hours Act, 1892 (55 & 56 Vict. c. 62), s. 3 (1). For definition of "week," see p. 446, *ante*. By the Shop Hours Act, 1892 (55 & 56 Vict. c. 62), s. 9, words and expressions other than "shop" and "young person" have the same meanings respectively as in the Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16) (now the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22)).

(*m*) Shop Hours Act, 1892 (55 & 56 Vict. c. 62), s. 3 (2). For hours in factories and workshops, see pp. 490—497, *ante*.

(*n*) Shop Hours Act, 1892 (55 & 56 Vict. c. 62), s. 5. By *ibid.*, s. 7, it is provided that offences shall be prosecuted and fines shall be recoverable in like manner as under the Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16), and of that Act ss. 88, 89, 90, 91, and so much of s. 92 as relates to evidence of age (now the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), ss. 143—147), are made applicable thereto. See pp. 531—536, *post*.

(*o*) Shop Hours Act, 1892 (55 & 56 Vict. c. 62), s. 6. This section is precisely the same as the corresponding one under the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22) (see p. 534, *post*), save that, under the former Act, the actual offender cannot be proceeded against in the first instance, or be ordered to pay costs.

SECT. 4. **Hours of Employment in Shops.**

In every shop in which a young person (*p*) is employed a notice must be kept exhibited by the employer in a conspicuous place, under a penalty not exceeding 40*s.* (*q*), referring to the foregoing provisions, and stating the number of hours in the week during which a young person may be lawfully employed in the shop (*r*).

Definition of shop."

1159. The term "shop" means retail and wholesale shops, markets, stalls, and warehouses in which assistants are employed for hire, and includes licensed public-houses, refreshment houses of any kind, and every place of business having a public-house licence (*a*); but a structure may be within the definition for one purpose and not for another (*b*).

Places and persons excluded.

The foregoing provisions do not apply to shops where the only persons employed are members of the same family dwelling in the building of which the shop forms part or to which it is attached, or to members of the employer's family so dwelling, or to persons wholly employed as domestic servants (*c*).

Local authority may make closing orders.

1160. A local authority (*d*) may make an Order, subject to confirmation by the Secretary of State (*e*), fixing the hours on all or any of the days of the week (*f*) at which, either throughout its area or in any specified part thereof, all shops, or shops of any specified class, are to be closed for serving customers (*g*). For this purpose the expression "shop" includes any premises or place

(*p*) *I.e.*, a person under the age of eighteen (Shop Hours Act, 1892 (55 & 56 Vict. c. 62), s. 9).

(*q*) Shop Hours Act, 1895 (58 & 59 Vict. c. 5), s. 1. The mere fact that the notice is not exhibited does not render the employment of persons in the shop an employment contrary to the Act within the meaning of this section (*Hammond* v. *Pulsford*, [1895] 1 Q. B. 223).

(*r*) Shop Hours Act, 1892 (55 & 56 Vict. c. 62), s. 4. See also notes (*a*) and (*b*), *infra*.

(*a*) Shop Hours Act, 1892 (55 & 56 Vict. c. 62), s. 9. "In this Act the word 'shop' seems to be used throughout with reference to the structure or place, as distinguished from the business carried on at that place," *Collman* v. *Roberts*, [1896] 1 Q. B. 457, *per* LINDLEY, L.J., at p. 459; *Savoy Hotel Co.* v. *London County Council*, [1900] 1 Q. B. 665, where it was held that the Savoy Hotel, London, was brought within the statute by the latter part of the definition. As to licensed public-houses and refreshment houses, see titles INNS AND INNKEEPERS; INTOXICATING LIQUORS.

(*b*) *Smith* (*W. H.*) *& Son* v. *Kyle*, [1902] 1 K. B. 286, where it was pointed out by Lord ALVERSTONE, C.J., at p. 288, that the definition is limited by the introductory words of the section, namely, "unless the context otherwise requires." Thus, a temporary erection of a board and trestles may be a "stall" for the purpose of limiting the weekly hours of employment, but not for the purpose of exhibiting the prescribed notice (*ibid.*).

(*c*) Shop Hours Act, 1892 (55 & 56 Vict. c. 62), s. 10. A page boy who slept in the hotel where he was employed, and who, though chiefly employed as a messenger, assisted in dusting the reception rooms, was held not to be "wholly employed as a domestic servant" (*Savoy Hotel Co.* v. *London County Council*, *supra*). As to the different classes of servants, see title MASTER AND SERVANT.

(*d*) For the local authorities who can exercise powers under the Shop Hours Act, 1904 (4 Edw. 7, c. 31), see p. 512, *post*.

(*e*) Shop Hours Act, 1904 (4 Edw. 7, c. 31), s. 8 (3).

(*f*) *A.-G.* v. *Brighton Corporation* (1908), 77 L. J. (CH.) 603, C. A. For definitions of time terms, see title TIME.

(*g*) Shop Hours Act, 1904 (4 Edw. 7, c. 31), s. 1.

where retail trade (including the business of a barber) is carried on (*h*).

The closing hour may be not earlier than 1 p.m. on one day in the week, and not earlier than 7 p.m. on the others; and the Order may prohibit, either absolutely or subject to exemptions and conditions, the carrying on of retail trade after closing hours in places other than shops; it may define the shops and trades to which the Order applies, authorise sales after the closing hour in cases of emergency, and contain any supplemental provisions which may seem necessary or proper (*i*). Where several businesses are carried on in the same shop, and any of them are of a nature to which the closing Order does not apply, the shop may be kept open after the closing hours for the purposes of those businesses alone, under such conditions as may be specified in the Order; such conditions, in the case of post office business, being subject to the approval of the Postmaster-General (*k*).

Contents of closing Order.

Nothing in a closing order is to apply to any fair lawfully held, nor to a bazaar for charitable purposes, nor to any shop where the only trade or business carried on is one or more of the following, namely, post offices; railway bookstalls or refreshment rooms; the sale by retail of intoxicating liquors; the sale of refreshments for consumption on the premises, or of medicines and medical and surgical appliances, or of tobacco and other smokers' requisites, or newspapers (*l*).

Exceptions.

The maximum penalty for contravening a closing Order is £1 for a first offence, £5 for a second offence, and £20 for a third or subsequent offence, but no person is liable to any penalty for serving after the closing hour any customer who was in the shop before that hour (*m*).

Penalty.

Before making a closing Order the local authority must satisfy themselves that a *primâ facie* case therefor is made out, and that the occupiers of at least two-thirds of the shops affected approve it, and must give public notice of their intention to make the Order, and consider objections thereto (*n*). As soon as the Secretary of State has confirmed the Order it becomes final and has the effect of an Act of Parliament.

Procedure for making Orders.

Every closing Order must be laid before Parliament after confirmation, and within forty days either House may pray His Majesty in Council to annul it. Any Order so annulled is void, but without prejudice to any proceedings which have been taken under it and to the power of making a new Order (*o*). After confirmation of an Order no objection can be taken thereto on the ground that the prescribed preliminary steps were not duly taken (*p*).

(*h*) Shop Hours Act, 1904 (4 Edw. 7, c. 31), s. 8 (3).
(*i*) *Ibid.*, s. 2 (1), (2), (3).
(*k*) *Ibid.*, s. 2 (5); and see titles INNS AND INNKEEPERS; INTOXICATING LIQUORS; MEDICINE AND PHARMACY; RAILWAYS AND CANALS; TRADE AND TRADE UNIONS. As to post offices generally, see title POST OFFICE.
(*l*) *Ibid.*, s. 2 (4), and Schedule.
(*m*) *Ibid.*, s. 5. And by *ibid.*, s. 8 the provisions of the Shop Hours Acts, 1892—1895, relating to offences and proceedings (see p. 509, *ante*) are hereto applied. Proceedings are under the Summary Jurisdiction Acts, see title MAGISTRATES.
(*n*) Shop Hours Act, 1904 (4 Edw. 7, c. 31), s. 3 (1).
(*o*) *Ibid.*, s. 3 (2) (3).
(*p*) *Hamilton* v. *Fyfe*, [1907] S. C. (J.) 79.

SECT. 4. Hours of Employment in Shops.

The Secretary of State may at any time revoke a closing Order either wholly or partly, on the application of the local authority, which must be made if the occupiers of a majority of any class of shops to which the Order applies object to it. Such revocation will be without prejudice to the making of a new closing Order (*q*).

Revocation.

Power is given to the Secretary of State to hold local inquiries at the expense of the local authority (*r*), and to make regulations relative to the foregoing provisions (*s*).

Local inquiries.

Local authorities.

The local authorities who may exercise powers with regard to closing Orders are, in London outside the City, the metropolitan borough councils, and elsewhere the councils of urban districts with a population, according to the census of 1901, of over 20,000, and any council or other authority having power to appoint inspectors under the Shop Hours Acts, 1892—1895 (*t*).

SECT. 5.—*Particulars of Work and Wages to be furnished to Piece-workers.*

In textile factories.

1161. In every textile factory (*a*) the occupier is required, for the purpose of enabling each piece-worker to compute the amount of wages payable to him, to publish in the following manner particulars of the rate of wages applicable to the work done and of the work to which that rate is to be applied :—

Weavers.

In the case of weavers in the worsted and woollen, other than the hosiery, trades, the particulars of the rate of wages applicable to the work done by each weaver must be furnished to him in writing at the time when the work is given out to him, and also exhibited on a placard not containing any other matter, and posted in a position where it is easily legible. In the case of weavers in the cotton trade such particulars are to be furnished in the same way, and the basis and conditions by which the prices are regulated are to be similarly exhibited and posted in each room.

Publication of particulars.

Other workers.

In the case of every other worker such particulars are to be furnished in the same way, but if the same particulars are applicable to the work to be done by each of the workers in one room, it is sufficient to exhibit them in that room.

Particulars in writing, not by symbol.

Such particulars of the work to be done by each worker as affect the amount of wages payable to him must (except so far as they are ascertainable by an automatic indicator) be furnished to him in writing at the time when the work is given out to him. Particulars either as to rate of wages or as to work must not be expressed by symbols.

Automatic indicator.

Where an automatic indicator is used for ascertaining work, the indicator is to have marked on its case the number of

(*q*) Shop Hours Act, 1904 (4 Edw. 7, c. 31), s. 4.
(*r*) *Ibid.*, s. 6.
(*s*) *Ibid.*, s. 7.
(*t*) *Ibid.*, s. 8 (1). As to the appointment of such inspectors, see p. 528, *post*. It is further provided that any expenses incurred by a metropolitan borough council under these provisions are to be defrayed as part of the expenses of the council, and the expenses of an urban district council as part of the general expenses incurred in the execution of the Public Health Acts (*ibid.*, s. 8 (2)). As to the expenses of local authorities generally, see title LOCAL GOVERNMENT.
(*a*) For definition, see p. 436, *ante*.

teeth in each wheel and the diameter of the driving roller; except that, in the case of spinning machines with traversing carriages, the number of spindles and the length of the stretch in such machines must be so marked in substitution for the diameter of the driving roller. Where such particulars of work are ascertained by an automatic indicator, and a placard containing the particulars as to the rate of wages is exhibited in each room, in pursuance of an agreement between employers and workmen and in conformity with the foregoing requirements, such exhibition will be a sufficient compliance therewith (*b*).

Penalties.

1162. An occupier failing to comply with the foregoing requirements or fraudulently using a false indicator, or a workman fraudulently altering an automatic indicator, will be liable, for each offence, to a fine not exceeding £10, and in the case of a second or subsequent conviction within two years from the last for that offence, not less than £1 (*c*). An offence is committed if particulars are furnished which are not in accordance with the facts, even though the worker had the power of ascertaining and rectifying the error (*d*). If anyone engaged as a worker in a factory, who has received any such particulars, whether directly or through a fellow workman, discloses them for the purpose of divulging a trade secret; or if anyone, for the purpose of obtaining knowledge of or divulging a trade secret, solicits or procures a person so engaged in a factory to disclose any such particulars, or with that object pays or rewards, or causes to be paid or rewarded, any such person for disclosing them, he will be liable to a fine not exceeding £10 (*e*).

Disclosure of trade secrets.

Application to non-textile factories and to workshops.

The Secretary of State may by special Order (*f*) apply the

(*b*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 116 (1).

(*c*) *I bid.*, s. 116 (2). The section includes a proviso that "an indicator shall not be deemed false if it complies with the requirements of this section." As to the recovery of fines, see p. 535, *post.*

(*d*) *Nussey* v. *Birtwhistle* (1894), 58 J. P. 735.

(*e*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 116 (3), (4).

(*f*) By various Orders of the Secretary of State these provisions have been extended, with modifications, to the following places and industries:—Pen-making (Order of 12th July, 1900 [1900—No. 521]); felt-hat making (Order of 22nd April, 1903 [1903—No. 334]); making of boots, shoes, artificial flowers, tents, rope, twine, paper bags, brushes, boxes or other receptacles or parts thereof made wholly or partially of paper, cardboard, chip, or similar material; making or repairing of sacks, umbrellas, sunshades, parasols or parts thereof; fustian cutting; covering of racquet or tennis balls; relief stamping; warehouse processes in the manufacture of articles of food, drugs, perfumes, blacking or other boot and shoe dressings, starch, blue, soda, or soap; and any processes incidental thereto (Order of 23rd May, 1907 [1907—No. 409]); pea-picking, and making of nets other than wire nets, or any processes incidental thereto (Order of 23rd May, 1907 [1907—No. 410]); making of iron and steel cables, chains, anchors, grapnels, and cart gear (including swivels, rings, loops, gear buckles, mullin bits, hooks, and attachments of all kinds) (Order of 14th July, 1902 [1902—No. 561]); mixing, casting, and manufacture of brass or articles or parts of articles of brass, and electro depositing of brass (except when carried on as a subsidiary process in shipbuilding yards, in marine locomotive or other engine building works, general engineering works, or machine tool works) (Order of 23rd September, 1907 [1907—No. 792]); making of locks, latches, and keys (Order of 14th July, 1902 [1902—No. 560]); workshops in which is carried on the preparing, manufacturing, or finishing

SECT. 5. Particulars of Work and Wages etc.

foregoing provisions, with any necessary modifications, to any class of non-textile factories, or of workshops other than men's workshops (*g*), or to any class of persons of whom lists may be required to be kept under the provisions relating to out-workers (*h*) and to their employers (*i*).

Inspection of weights and measures.

All statutory provisions relating to weights and measures (including the powers of inspectors of weights and measures) are extended to weights, measures, scales, balances, steelyards and weighing machines used in a factory or workshop in checking or ascertaining the wages of persons employed therein as if used in the sale of goods in a place where goods are kept for sale (*k*).

SECT. 6.—*Truck and Allied Matters.*

SUB-SECT. 1.—*General Provisions.*

Wages to be paid in coin.

1163. The entire amount of the wages (*l*) earned by or payable to any workman (*m*) in respect of any labour done by him must be actually paid to him in the current coin of the realm (*n*), and not otherwise (*o*); and any payment made to any such workman by his employer (*p*) of or in respect of wages, by the delivery of goods (*a*), or otherwise than in current coin of the realm, is

or any process incident to the manufacture of cotton, wool, hair, silk, flax, hemp, jute, tow, china grass, cocoanut fibre, or other like material either separately or mixed together or mixed with any other material or any fabric made thereof (except print works, bleaching and dyeing works, lace warehouses, paper mills, flax scutch mills, rope works, and hat works) (Order of 2nd September, 1898 [1898—No. 652]); making, altering, ornamenting, finishing, and repairing of wearing apparel (except felt hats), and any work incidental thereto (Order of 14th September, 1909 [1909—No. 1027]); manufacture of chocolates, sweetmeats, cartridges, and tobacco (Order of 15th November, 1909 [1909—No. 1337]); bleaching and dyeing works and printing of cotton cloth (Order of 22nd November, 1909 [1909—No. 1370]); shipbuilding yards (so far as concerns the work of platers, riveters, and caulkers) (Order of 30th December, 1909 [1909—No. 1499]).

(*g*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 157. For definition, see p. 443, *ante*.

(*h*) See p. 463, *ante*.

(*i*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 116 (5).

(*k*) *Ibid.*, s. 117; and see title WEIGHTS AND MEASURES.

(*l*) For definition, see p. 516, *post*. As to the relation generally between master and servant, see title MASTER AND SERVANT; as to the nature of the contract, see titles BAILMENT, Vol. I., p. 556; WORK AND LABOUR.

(*m*) For definition, see p. 516, *post*.

(*n*) As to this expression, see p. 516, *post*.

(*o*) The payment must be *bonâ fide* and out-and-out, not merely colourable (*Gould* v. *Haynes* (1889), 59 L. J. (M. C.) 9). Payment partly in coin and partly in account is illegal, unless expressly authorised by the workman, and the master may not even deduct a lawful debt due to him from the workman (*Williams* v. *North's Navigation Collieries* (1889), *Ltd.*, [1906] A. C. 136; and compare *Hewlett* v. *Allen*, [1894] A. C. 383). It is doubtful whether mere non-payment of all or part of the wages is an offence under this provision; see *Willis* v. *Thorp* (1875), L. R. 10 Q. B. 383; and *Redgrave* v. *Kelly* (1889), 54 J. P. 70, and compare *Williams* v. *North's Navigation Collieries* (1889), *Ltd.*, *supra*. As to what deductions are permitted, see pp. 520—523, *post*.

(*p*) For definition, see p. 516, *post*.

(*a*) Payment by an order on a shop for delivery of goods is equivalent to a payment in goods (*Athersmith* v. *Drury* (1858), 1 E. & E. 46), as also to give

illegal, null, and void (*b*), even though the workman has the option to receive cash, and chooses to take goods instead (*c*).

Payments made by an employer to a third party at the instance of a workman are payments to the workman as much as if current coin of the realm had been placed in his hands (*d*).

Contracts for payment not in coin illegal.

1164. Any contract (*e*) for the hiring of any workman, or for the performance by any workman of any labour, which provides that the whole or any part of the wages of such workman, shall be payable in any manner other than in current coin of the realm (*f*) is illegal, null, and void (*g*).

Agreement as to expending wages.

Any contract (*h*) made between a workman (*i*) and his employer (*k*), by which any provision is made, directly or indirectly, respecting the place where, or the manner in which, or the person or persons with whom, the whole or any part of the wages (*l*) due or to become due to such workman shall be expended, is illegal, null, and void (*m*). No employer may, directly or indirectly, by himself or his agent, impose any such provision as a condition, express or implied, for the employment of any workman, or dismiss any workman on account of the place, manner, or person in which, or with whom, any wages paid by him to such workman are or are not expended (*n*).

the workman goods which he has damaged and deduct from his wages their full value as if undamaged (*Smith* v. *Walton* (1877), 3 C. P. D. 109). As to fines for damaged goods, see p. 521, *post*.

(*b*) Truck Act, 1831 (1 & 2 Will. 4, c. 37), s. 3. For the penalty, see p. 518, *post*.

(*c*) *Wilson* v. *Cookson* (1863), 13 C. B. (N. S.) 496.

(*d*) *Hewlett* v. *Allen*, [1894] A. C. 383, in which case it was a rule of the employer's factory, to which the appellant agreed, that "all employees will have to become members of the sick and accident club," which had been established for the benefit of the respondent's workpeople. Weekly deductions, in which the appellant acquiesced, were made from wages due, and the total of such deductions was paid into a separate fund by the firm through the treasurer of the fund. The opinions expressed by Lord SELBORNE, L.C., and COTTON, L.J., in *Re Morris, Ex parte Cooper* (1884), 26 Ch. D. 693, C. A., that contributions advanced by the respondent firm on behalf of the appellant to a doctor's fund were substantially equivalent to payments to the workman in current coin, were approved; and see *M'Lucas* v. *Campbell* (1892), 30 Sc. L. R. 226.

(*e*) For definition, see p. 516, *post*.

(*f*) As to this expression, see p. 516, *post*. Apparently, a contract whereby a workman is to receive part of his wages in the form of shares in the company which employs him is a contract for part payment of wages otherwise than in current coin (*Glasgow* v. *Independent Printing Co.*, [1901] 2 I. R. 278, C. A.).

(*g*) Truck Act, 1831 (1 & 2 Will. 4, c. 37), s. 1. For the penalty, see p. 518, *post*.

(*h*) For definition, see p. 516, *post*.

(*i*) For definition, see p. 516, *post*.

(*k*) For definition, see p. 516, *post*.

(*l*) For definition, see p. 516, *post*.

(*m*) Truck Act, 1831 (1 & 2 Will. 4, c. 37), s. 2.

(*n*) Truck Amendment Act, 1887 (50 & 51 Vict. c. 46), s. 6 This section does not apply to contracts or deductions made legal by the Truck Act, 1831 (1 & 2 Will. 4, c. 37), s. 23 (see p. 520, *post*) (*Lamb* v. *Great Northern Rail. Co.*, [1891] 2 Q. B. 281). As to compulsory membership of benefit societies under the Shop Clubs Act, 1902 (2 Edw. 7, c. 21), see p. 523, *post*; and title CLUBS, Vol. IV., p. 410.

SECT. 6. **Truck and Allied Matters.**

Payment for articles made by workman.

1165. Where articles under the value of £5 knitted, made, or prepared of wool, worsted, yarn, stuff, jersey, linen, fustian, cloth, serge, cotton, leather, fur, hemp, flax, mohair, silk, or any combination thereof, or of bone, thread, silk, or cotton lace, or lace made of any mixed materials, are made by a person at his own home, or otherwise, without the employment of any person under him except a member of his own family, such person is, as regards the remuneration for such articles, regarded as a workman earning wages, and the person buying such articles in the way of trade is regarded as his employer, and the price of an article is regarded as wages (*o*). This provision may be suspended in any county or place by Order in Council if it is expedient in the interests of the persons making the above articles so to do (*p*).

Interest not to be deducted from advances.

1166. Whenever by agreement, custom, or otherwise a workman (*q*) is entitled to receive part of his wages (*r*) in advance, the employer (*s*) may not withhold such advance nor make any deduction in respect thereof on account of poundage, discount, interest, or any similar charge (*t*).

Definition of "current coin of the realm."

1167. Payments of wages made in bank-notes or in cheques on a bank within fifteen miles of the place of payment, or contracts for payment in such form, are equivalent to payments in current coin, if the workman freely consents thereto (*a*).

"Employer."

1168. All masters, bailiffs, foremen, managers, clerks, and other persons engaged in the hiring, employment, or superintendence of the labour of any workman are deemed to be employers (*b*).

"Wages."

Any money or other thing had or contracted to be paid, delivered, or given as a recompense, reward, or remuneration for any labour done or to be done, whether within a certain time or to a certain amount, or for a time or an amount uncertain, is deemed to be the wages of such labour (*b*).

"Contract."

Any agreement, understanding, device, contrivance, collusion, or arrangement whatsoever on the subject of wages, whether written or oral, direct or indirect, to which the employer and workman are parties or are assenting, or by which they are mutually bound to each other, or whereby either of them has endeavoured to impose an obligation on the other of them, is deemed to be a contract (*b*). Evidence may be given of an illegal verbal arrangement, notwithstanding the existence of a written contract between the parties (*c*).

"Workman."

The expression "workman" does not include a domestic or menial servant, but, save as aforesaid, means any person who,

(*o*) Truck Amendment Act, 1887 (50 & 51 Vict. c. 46), s. 10.
(*p*) *Ibid.*
(*q*) For definition, see para. 1168, *infra.*
(*r*) For definition, see *ibid.*
(*s*) For definition, see *ibid.*
(*t*) Truck Amendment Act, 1887 (50 & 51 Vict. c. 46), s. 3.
(*a*) Truck Act, 1831 (1 & 2 Will. 4, c. 37), s. 8.
(*b*) *Ibid.*, s. 25; Truck Amendment Act, 1887 (50 & 51 Vict. c. 46), s. 14.
(*c*) *Jones* v. *Wasley* (1902), 18 T. L. R. 418.

being a labourer, servant in husbandry (*d*), journeyman, artificer (*e*), handicraftsman, miner, or engaged in any kind of manual labour (*f*) *ejusdem generis* with those mentioned (*g*), whether under or above the age of twenty-one, has entered into or works under a contract with an employer, whether the contract be express or implied, oral or in writing, or a contract of service or a contract personally to execute any work or labour (*h*). The workman must have contracted to give his personal services, and not merely to get the work done (*i*), but if he is bound under his contract to work personally, he is not excluded from the definition simply because he has assistance from others who work under him (*k*).

Recovery of wages not paid in current coin.

1169. A workman is entitled to recover from his employer the whole or so much of his wages as has not been actually paid to him by his employer in current coin of the realm (*l*).

(*d*) As to servants in husbandry, see p. 520, *post*. As to the meaning of the term, see *Davies* v. *Berwick (Lord)* (1861), 3 E. & E. 549.

(*e*) The Truck Act, 1831 (1 & 2 Will. 4, c. 37), originally applied only to "artificers" as therein defined, and some of the cases decided on that definition throw light upon the expression here; see *Ex parte Ormrod* (1844), 1 Dow. & L. 825; *Bowers* v. *Lovekin* (1856), 6 E. & B. 584; *Millard* v. *Kelly* (1858), 7 W. R. 12; *Moorhouse* v. *Lee* (1864), 4 F. & F. 354. But the present definition is much wider than the old one, and many persons who were formerly outside the scope of the Truck Acts are now brought within them.

(*f*) Such manual labour must be the workman's real and substantial work, and not merely incidental thereto (*Bound* v. *Lawrence*, [1892] 1 Q. B. 226, C. A.). A motor omnibus driver who has to do necessary repairs to his vehicle is within the definition (*Smith* v. *Associated Omnibus Co.*, [1907] 1 K. B. 916), and so is a sempstress who works a sewing machine (*Maynard* v. *Robinson (Peter), Ltd.* (1903), 89 L. T. 136); but the following persons have been held to be outside it: omnibus conductors (*Morgan* v. *London General Omnibus Co.* (1884), 13 Q. B. D. 832, C. A., but see a contrary opinion in *Wilson* v. *Glasgow Tramways Co.* (1878), 5 R. (Ct. of Sess.) 981); tramcar drivers (*Cook* v. *North Metropolitan Tramways Co.* (1887), 18 Q. B. D. 683); goods guards (*Hunt* v. *Great Northern Rail. Co.*, [1891] 1 Q. B. 601); grocers' assistants (*Bound* v. *Lawrence*, *supra*); public-house potmen living on the premises (*Pearce* v. *Lansdowne* (1893), 62 L. J. (Q. B.) 441); and hairdressers (*R.* v. *Louth Justices*, [1900] 2 I. R. 714). As to the position of persons engaged to do scientific work etc. involving manual labour, see *Jackson* v. *Hill* (1884), 13 Q. B. D. 618; and *Bagnall* v. *Levinstein, Ltd.*, [1907] 1 K. B. 531, C. A.

It is doubtful whether the inmates of a charitable institution, who are set to labour, and provided with free food and lodging, are within the definition; see *Poplar Union* v. *Martin* (1904), 91 L. T. 550, *per* PHILLIMORE, J., at p. 552.

The expression "manual labour" here does not necessarily bear the same meaning as it does in the Factory and Workshop Acts (*Hoare* v. *Green (Robert), Ltd.*, [1907] 2 K. B. 315).

(*g*) *Morgan* v. *London General Omnibus Co.* (1883), 12 Q. B. D. 201, *per* DAY, J., at p. 206.

(*h*) Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 10, applied to the Truck Acts by the Truck Amendment Act, 1887 (50 & 51 Vict. c. 46), s. 2.

(*i*) *Riley* v. *Warden* (1848), 2 Exch. 59; *Sharman* v. *Sanders* (1853), 13 C. B. 166; *Ingram* v. *Barnes* (1857), 7 E. & B. 115; *Sleeman* v. *Barrett* (1863), 2 H. & C. 934, where POLLOCK, C.B., at p. 942, said, "If the contract is not for the labour, but for the result or effect of the labour . . . that is not within the Act"; *Pillar* v. *Llynvi Coal and Iron Co.* (1869), L. R. 4 C. P. 752; and *Squire* v. *Midland Lace Co.*, [1905] 2 K. B. 448; see also *Weaver* v. *Floyd* (1852), 21 L. J. (Q. B.) 151, and the observations thereon of COCKBURN, C.J., in *Ingram* v. *Barnes*, *supra*, at p. 136.

(*k*) *Grainger* v. *Aynsley*, *Bromley* v. *Tams* (1880), 6 Q. B. D. 182; see also *Whiteley* v. *Armitage* (1864), 13 W. R. 144.

(*l*) Truck Act, 1831 (1 & 2 Will. 4, c. 37), s. 4. Power is given to guardians

SECT. 6. Truck and Allied Matters.

Employer has no right of action where goods supplied as wages.

1170. No employer of any workman is entitled to sue such workman in respect of any goods, wares, or merchandise sold, delivered, or supplied to such workman by such employer, whilst in his employment, on account of his wages or as a reward for his labour, or sold, delivered, or supplied to him at any shop or warehouse kept by or belonging to such employer, or in the profits of which such employer has any share or interest (*m*); nor may such employer, nor his agent, nor any person supplying goods to such workman under any order or direction of such employer or agent, sue such workman in respect of any goods supplied by such employer or agent, or under his order or direction (*n*).

No set-off for goods supplied by employer.

None of these claims may be raised by way of set-off or counterclaim in any proceedings brought by the workman against his employer for the recovery of his wages (*o*).

Offences and penalties.

1171. Any employer who contravenes any of the foregoing provisions is liable to a penalty not exceeding £10 for the first offence, and not less than £10 nor more than £20 for the second offence. For a third offence he will be deemed guilty of a misdemeanour, and punished by a fine not exceeding £100 (*p*). If the offence has in fact been committed by the employer's agent or some other person, such agent or person is liable to the same penalty as if he were the employer (*q*). Offences may be prosecuted and penalties recovered in manner provided by the Summary Jurisdiction Acts (*r*), so, however, that no penalty may be imposed on summary conviction exceeding that prescribed for a second offence (*s*). Penalties recovered are to be paid into the Exchequer and carried to the Consolidated Fund (*t*).

When offender is punishable.

No person may be punished as for a second offence unless ten days have intervened between the convictions for the first and second offences, but each separate offence before the expiration of the ten days is punishable by a separate penalty as for a first offence; and no person may be punished as for a third offence unless ten days have intervened between the convictions for the second and third offences, but each separate offence before the expiration of the ten days is punishable by a separate penalty as for a second offence. A fourth or any subsequent offence is tried and punished in the manner provided for a third offence (*u*).

to recover from the employer unpaid wages due to a workman who has, or whose wife, widow, or children have, become chargeable to the parish (*ibid.*, s. 7; and Truck Amendment Act, 1887 (50 & 51 Vict. c. 46), s. 16); and see title POOR LAW.

(*m*) Truck Act, 1831 (1 & 2 Will. 4, c. 37), s. 6. For the exceptions to this general rule, see p. 520, *post*.

(*n*) Truck Amendment Act, 1887 (50 & 51 Vict. c. 46), s. 5.

(*o*) Truck Act, 1831 (1 & 2 Will. 4, c. 37), s. 5; Truck Amendment Act, 1887 (50 & 51 Vict. c. 46), s. 5. As to set-off generally, see title SET-OFF AND COUNTERCLAIM.

(*p*) Truck Act, 1831 (1 & 2 Will. 4, c. 37), s. 9; and Truck Amendment Act, 1887 (50 & 51 Vict. c. 46), s. 11.

(*q*) Truck Amendment Act, 1887 (50 & 51 Vict. c. 46), s. 12 (1).

(*r*) See title MAGISTRATES.

(*s*) Truck Amendment Act, 1887 (50 & 51 Vict. c. 46), s. 13 (1).

(*t*) *Ibid.*, s. 13 (3).

(*u*) Truck Act, 1831 (1 & 2 Will. 4, c. 37), s. 10.

If no evidence of a previous conviction is produced, the offender will be punished for each separate offence by an equal number of separate penalties as though each offence were a first or a second offence, as the case may be (*a*). No person may be proceeded against or punished as for a second or third offence after more than two years from the commission of the next preceding offence (*b*). The provisions which enable a workman to recover in coin of the realm wages already paid otherwise than in coin, and those which make payment in goods punishable, are cumulative, and accordingly liability to a penalty remains although the offending employer has already been ordered to pay in cash a sum he has previously paid in goods (*c*).

Offences committed by partner.

1172. No person may be convicted of any such offence committed by his partner in trade without his knowledge, privity, or consent; but any penalty or other sums ordered to be paid may be levied by distress and sale of any goods of the partnership; and in proceedings to recover wages the justices may make an order upon any one or more partners for payment of the sum due. Service of any process or order upon one partner is sufficient service upon all (*d*).

Exemption of employer on conviction of actual offender.

1173. An employer charged with such an offence may, if the offence was committed without his knowledge, be exempted from any penalty on conviction of the actual offender (*e*).

Service of summons.

1174. It is sufficient service of any summons if a duplicate or true copy be left at the offender's place of business or residence (*f*).

Disqualification of justices.

1175. A person engaged in the same trade or occupation as an employer charged with an offence under the foregoing provisions is not to act as a justice of the peace in hearing and determining such charge (*g*).

No quashing for want of form.

1176. No conviction, order, or adjudication made by any justices of the peace under the foregoing provisions may be quashed for want of form, or removed by *certiorari* (*h*) or otherwise into the High Court (*i*).

Inspector's powers of enforcement

1177. It is the duty of the inspectors of factories and the inspectors of mines, respectively, to enforce the foregoing provisions in factories, workshops, and mines within their districts; and such inspectors, for this purpose, have the same powers as they have respecting factories, workshops, or mines (*k*).

(*a*) Truck Act, 1831 (1 & 2 Will. 4, c. 37), s. 10.
(*b*) *Ibid.*
(*c*) *Fisher* v. *Jones* (1863), 13 C. B. (N. S.) 496, 501.
(*d*) Truck Act, 1831 (1 & 2 Will. 4, c. 37), s. 13. As to partnership, see title PARTNERSHIP.
(*e*) Truck Amendment Act, 1887 (50 & 51 Vict. c. 46), s. 12 (2). This section is identical with the corresponding one under the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22) (see p. 534, *post*), save that under the latter Act the actual offender may be ordered to pay the employer's costs, and an inspector, before proceeding against the actual offender, must be satisfied that the offence was committed in contravention of the employer's orders.
(*f*) Truck Act, 1831 (1 & 2 Will. 4, c. 37), s. 14.
(*g*) Truck Amendment Act, 1887 (50 & 51 Vict. c. 46), s. 15.
(*h*) See title CROWN PRACTICE, Vol. X., p. 155.
(*i*) Truck Act, 1831 (1 & 2 Will. 4, c. 37), s. 17.
(*k*) Truck Amendment Act, 1887 (50 & 51 Vict. c. 46), s. 13 (2). This provision applies to laundries and places where work is given out as well as to

SECT. 6. SUB-SECT. 2.—*Deductions from Remuneration.*

Truck and Allied Matters.

Lawful deductions from wages.

1178. Subject to the conditions mentioned below, deductions from wages, or contracts for such deductions, may legally be made in respect of the following matters (*l*), namely:—Hay, corn, or other provender to be consumed by any horse or other beast of burden employed by the workman in his trade or occupation (*m*); fuel (*m*); medicine or medical attendance (*m*); materials (*n*), tools, or implements employed by a miner in his trade or occupation (*m*); victuals dressed or prepared under the employer's roof and there consumed by the workman (*o*); rent of any tenement demised to the workman (*o*); money advanced for any of the aforesaid purposes (*o*), or for the education of the workmen's children (*p*), or in respect of the cost of sharpening or repairing tools (*q*); fines (*r*); damage to goods or materials (*r*); and the use or supply of materials, tools, or machines, standing room, light, and heat (*r*). A contract with a servant in husbandry for giving him food, non-intoxicating drink, a cottage, or other allowances or privileges as remuneration, is legal (*s*).

Deductions from nominal wages.

Deductions from the workman's nominal wages in respect of materials, tools, or services supplied by the employer (*t*) to the workman (*a*) in the way of his trade and to enable him to do his work, which are not in the nature of payment, but represent the mode of calculating the amount of the real wages, are not illegal as being payment otherwise than in coin (*b*).

factories (Truck Act, 1896 (59 & 60 Vict. c. 44), s. 10). As to the powers of factory inspectors, see p. 529, *post;* and as to inspectors of mines, see title MINES, MINERALS AND QUARRIES.

(*l*) "By ss. 23 and 24 certain deductions are permitted to be made and no other deductions or particular exceptions are, in my opinion, authorised" (*Williams* v. *North's Navigation Collieries* (1889), *Ltd.*, [1906] A. C. 136, *per* Lord DAVEY, at p. 142, referring to the Truck Act, 1831 (1 & 2 Will. 4, c. 37)). But nevertheless a number of other deductions are recognised and regulated by the Truck Amendment Act, 1887 (50 & 51 Vict. c. 46), and the Truck Act, 1896 (59 & 60 Vict. c. 44) (see notes (*q*), (*r*) and (*s*), *infra*, and pp. 521, 522, *post*).

(*m*) Truck Act, 1831 (1 & 2 Will. 4, c. 37), s. 23. A deduction may legally be made for a weekly contribution to a medical club managed by the employer of which the workman may never want to make use (*Cutts* v. *Ward* (1867), L. R. 2 Q. B. 357).

(*n*) The materials must be sold out and out, and not merely hired (*Cutts* v. *Ward, supra*).

(*o*) Truck Act, 1831 (1 & 2 Will. 4, c. 37), s. 23.

(*p*) *Ibid.*, s. 24. The section further authorises the employer to advance to the workman money to be contributed by him to any friendly society or savings bank, or for relief of sickness, but it omits to authorise deductions from wages in respect thereof.

(*q*) By implication from the Truck Amendment Act, 1887 (50 & 51 Vict. c. 46), s. 8; see p. 521, *post.*

(*r*) By implication from the Truck Act, 1896 (59 & 60 Vict. c. 44), ss. 1, 2, 3; see pp. 521, 522, *post.*

(*s*) Truck Amendment Act, 1887 (50 & 51 Vict. c. 46), s. 4. For the meaning of "servant in husbandry," see *Davies* v. *Berwick (Lord)* (1861), 3 E. & E. 549.

(*t*) For definition, see p. 516, *ante.*

(*a*) For definition, see p. 516, *ante.*

(*b*) *Chawner* v. *Cummings* (1846), 8 Q. B. 311, where it was held not illegal for employers, following the practice of the hosiery trade, to let out frames to the framework knitters in their employ and to deduct the rent from the earnings. In *Archer* v. *James* (1859), 2 B. & S. 61, that decision was challenged

Special provisions.

No deduction may be made except in pursuance of a contract in writing signed by the workman (*c*), who may recover any deduction made without his written consent (*d*).

Deductions for fuel, materials, tools, implements, and provender must not exceed their true value (*e*).

Deductions for medicine, medical attendance, tools, and education must be submitted at least once a year for audit by two auditors appointed by the workmen concerned (*f*).

Deductions for sharpening or repairing tools can only be made in pursuance of an agreement not forming part of the condition of hiring (*g*).

In the case of deductions for education, if the workman sends his child to a state-inspected school selected by him, he is entitled to have the fees of such child at such school paid at the same rate and to the same extent as other workmen from whose wages the like deduction is made by the same employer (*h*).

It is sufficient if the things in respect of which the deductions are to be made are inserted in the contract; it is not necessary that the sums to be deducted in respect of each should be mentioned, and such particulars may accordingly be ascertained from other contracts and proved by parol evidence (*i*).

When deductions for fines, or damage to goods, may be made.

1179. The employer (*j*) may not make any deduction, nor receive any payment from the workman (*k*), in respect of fines, damage to goods or materials or other property of the employer (including bad or negligent work), or the use or supply of materials, tools, or machines, standing room, light, heat, or other similar matters, except upon the following conditions (*l*), namely:—The deduction

in respect of deductions for rent of frame, rent of machine, standing room, winding the yarn, gas and firing. The Court of Queen's Bench refused to depart from the decision in *Chawner* v. *Cummings* (1846), 8 Q. B. 311, and in the Exchequer Chamber the court was equally divided, so that the decision stood. But for the present law as to frame rents, see p. 524, *post*. In *Hughes* v. *Bonella* (1894), 10 T. L. R. 197, deductions for steam power supplied were held to be legal. In *Owner* v. *Hooper* (1903), 89 L. T. 130, the deduction by the employer from the wages of his workmen of a sum to provide for the insurance of the employer against liability in respect of compensation for injury to the workmen was held not a payment otherwise than in coin, and therefore not contrary to the Truck Act, 1831 (1 & 2 Will. 4, c. 37), s. 3.

(*c*) Truck Act, 1831 (1 & 2 Will. 4, c. 37), s. 23, and see *Hynd* v. *Spowart & Co.* (1884), 22 Sc. L. R. 702.

(*d*) *Pillar* v. *Llynvi Coal Co.* (1869), L. R. 4 C. P. 752.

(*e*) Truck Act, 1831 (1 & 2 Will. 4, c. 37), s. 23.

(*f*) Truck Amendment Act, 1887 (50 & 51 Vict. c. 46), s. 9.

(*g*) *Ibid.*, s. 8.

(*h*) *Ibid.*, s. 7.

(*i*) *Cutts* v. *Ward* (1867), L. R. 2 Q. B. 357, where the written and signed contract providing that, "all rents of houses, gardens etc., due to the owners of these works, and all charges to which any workman shall be liable for wood, tools or working materials obtained from the stores belonging to the works . . . and for medicine and medical attendance, and all other lawful stoppages, shall be deducted from the earnings of such workmen before such earnings be paid," was held a sufficient compliance with the statute.

(*j*) For definition, see p. 516, *ante*.

(*k*) As regards fines, the expression "workman" includes a shop assistant (Truck Act, 1896 (59 & 60 Vict. c. 44), s. 1 (3)).

(*l*) Truck Act, 1896 (59 & 60 Vict. c. 44), ss. 1, 2, 3. It is doubtful whether

SECT. 6. Truck and Allied Matters.

or payment must be in pursuance of a contract; written particulars of the acts, omissions, or things for which the deduction or payment is made, and the amount thereof, must be supplied to the workman on each occasion of such deduction or payment; the deduction or payment must be fair and reasonable, having regard to all the circumstances of the case (*m*). The contract must be in writing and signed by the workman, or contained in a notice kept constantly affixed at a place or places open to the workmen and in such a position that it may be easily seen, read, and copied by all whom it affects (*n*). Under penalty of a fine not exceeding 40*s*. (*o*) the employer must produce the contract to any inspector of factories or mines on his written demand, and the latter is at liberty to make a copy thereof; and the employer must, at the time of making it, give the workman who is party to it a copy of the contract or of the notice containing its terms (*p*). The latter is entitled, on request, to obtain from the employer a copy of such contract or notice (*q*). Contracts under the above provisions are exempt from stamp duty (*a*).

Requisites of contract.

Fines.

In the case of fines, the deduction or payment must be in respect of some act or omission likely to cause damage or loss to the employer or interruption to his business (*b*); the contract must specify the acts or omissions in respect of which the fine may be imposed (*c*), and the amount of the fine, or particulars from which that amount can be ascertained (*d*); and the employer must, under penalty of a fine not exceeding 40*s*., keep a register of fines, open to inspection by inspectors of factories and mines, and enter therein the amount of the fine and the reason why it was imposed (*e*).

Damage to goods.

In the case of damage to property of the employer, or supply of materials or tools, the deduction or payment must not exceed the actual or estimated damage or cost to the employer (*f*).

Non-payment of bonus for full attendance.

1180. Non-payment of a bonus given for full attendance is not a fine (*g*). The fact that a workman has incurred a fine under his

deductions for fines not authorised by this Act amount to payment otherwise than in coin within the meaning of the Truck Act, 1831 (1 & 2 Will. 4, c. 37) (see p. 514, *ante*). In *Redgrave* v. *Kelly* (1889), 54 J. P. 70, and *Beetham* v. *Crewdson* (1890), 55 J. P. 55, following *Willis* v. *Thorp* (1875), L. R. 10 Q. B. 383, it was held that they do not, but these cases, though not expressly overruled, are difficult to reconcile with *Williams* v. *North's Navigation Collieries* (1889), *Ltd.*, [1906] A. C. 136.

(*m*) Truck Act, 1896 (59 & 60 Vict. c. 44), ss. 1, 2, 3.

(*n*) *Ibid.*

(*o*) *Ibid.*, s. 6 (4).

(*p*) *Ibid.*, s. 6 (1).

(*q*) *Ibid.*, s. 6 (2).

(*a*) *Ibid.*, s. 7.

(*b*) *Ibid.*, s. 1 (1). Dancing during the dinner hour in the workroom of a factory was held to be conduct likely to cause injury, by reason of the dust raised, to machinery and materials (*Squire* v. *Bayer & Co.*, [1901] 2 K. B. 299); see also Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 11, and *Gregson* v. *Watson* (1876), 34 L. T. 143.

(*c*) A rule providing that "all workers shall observe good order and decorum while in the factory" is a sufficient specification of such acts or omissions (*Squire* v. *Bayer & Co.*, [1901] 2 K. B. 299).

(*d*) Truck Act, 1896 (59 & 60 Vict. c. 44), s. 1 (1).

(*e*) *Ibid.*, s. 6 (3), (4).

(*f*) *Ibid.*, ss. 2, 3.

(*g*) *Deane* v. *Wilson*, [1906] 2 I. R. 405, in which the facts were that the

contract does not prevent the employer proceeding against him for a penalty or damages under the Employers and Workmen Act, 1875 (*h*).

Any employer entering into any contract, or making any deductions, or receiving any payments, contrary to the foregoing provisions, will be liable to penalties as for an illegal contract or payment (*i*). Penalties.

1181. Any workman or shop assistant may recover any sum deducted or paid contrary to the foregoing provisions, but if he has acquiesced in such deduction or payment he can only recover any excess over the amount, if any, which the court may find to have been fair and reasonable (*k*). Proceedings for such recovery must be commenced within six months from the date of the deduction or payment (*a*). Recovery of wrongful deductions.

1182. If satisfied that the foregoing provisions as to deductions or payments for fines, bad work or damage, or materials, tools or services, are unnecessary for the protection of the workmen employed in any trade or business, or in any branch or department thereof, either generally or within any specified area, the Secretary of State may, by Order, grant an exemption in respect thereof, and may amend or revoke such Order. Every such Order is to be laid before both Houses of Parliament, by either of whom it may, within forty days, be annulled (*b*). Power to exempt.

SUB-SECT. 3.—*Shop Clubs and Thrift Funds.*

1183. An employer may not make it a condition of employment that a workman shall discontinue his membership, or that he shall Membership as condition of employment.

workwoman was paid wages 1*s.* 4*d.* per day; that the employers, in order to obtain full attendance, gave a bonus of 2*s.* a week for full attendance and for that alone, and that any absence from work during the week involved loss of the 2*s.*, in addition to a proportionate deduction from the daily wage. One of the rules of the factory provided that "any person absent without leave and not assigning satisfactory reason, shall lose bonus—or be discharged or prosecuted . . ." It was held that this non-payment of the 2*s.* could not be regarded as a deduction from the sum contracted to be paid.

(*h*) *Buxton Lime Firms Co.* v. *Howe*, [1900] 2 Q. B. 232. "The Truck Act does not deal with damages: it deals with fines and payments in respect of fines; and neither under that Act nor under the contract has the master given up his right to claim damages for the loss occasioned to him by reason of the workman's nonfeasance" (*per* DARLING, J., at p. 239); and see title MASTER AND SERVANT.

(*i*) Truck Act, 1896 (59 & 60 Vict. c. 44), s. 4. The penalties referred to are prescribed by the Truck Act, 1831 (1 & 2 Will. 4, c. 37), s. 9, as to which, see p. 518, *ante*.

(*k*) Truck Act, 1896 (59 & 60 Vict. c. 44), s. 5.

(*a*) *Ibid.* This provision is confined to the special deductions or payments prohibited by the Truck Act, 1896 (59 & 60 Vict. c. 44) (*Glasgow* v. *Independent Printing Co.*, [1901] 2 I. R. 278, C. A., *per* HOLMES, L.J., at p. 321).

(*b*) Truck Act, 1896 (59 & 60 Vict. c. 44), s. 9. By Order dated 3rd March, 1897 [1897—No. 299], Statutory Rules and Orders Revised, Vol. VIII., "Master and Servant," this exemption has been made in respect of all branches of the weaving of cotton in Lancashire, Cheshire, Derbyshire, and the West Riding of Yorkshire; and, by Order dated 30th July, 1897 [1897—No. 629], in respect of iron ore mines and limestone quarries in the Furness or detached part of Lancashire and the Millom Urban District, Cumberland, and of ironstone mines in the North Riding of Yorkshire.

SECT. 6. Truck and Allied Matters.

not become a member of any friendly society (*c*) other than a shop club (*d*).

SUB-SECT. 4.—*Special Provisions relating to the Hosiery Trade.*

Wages payable in current coin without deduction.

1184. In all contracts (*e*) for wages (*f*) in the hosiery manufacture the full and entire amount of such wages is to be made payable in the current coin of the realm, and not otherwise, without any deduction or stoppage whatever, except for bad and disputed workmanship (*g*).

Illegal contracts.

All contracts to stop wages, or for frame rents or charges, between employer (*h*) and artificers (*i*), are illegal, null, and void (*k*).

Penalty.

For breach of these provisions an employer is liable to forfeit £5 for every offence, recoverable in the county court (*l*), and no action or set-off is allowed for any deduction or stoppage of wages, nor for any contract so declared illegal (*m*). The deduction of fines for non-attendance is not within these provisions (*n*).

Improper use of frame.

1185. If any frame or machine intrusted to any artificer or other person by his employer for use for such employer in the hosiery manufacture, or in any process incidental thereto, is used without the written consent of the employer in the manufacture of any articles for any other person, the artificer or other person to whom the same is intrusted is liable to forfeit 10*s.* for every day on any part of which the frame or machine has been so worked, used, or employed, recoverable in the county court by the person intrusting the same (*o*).

"Artificers."

1186. The term "artificers" includes all workmen, labourers, and other persons in any manner engaged in the performance of any employment or operation in or about the hosiery manufacture (*p*).

"Employers."

The term "employers" includes all masters, foremen, managers, clerks, contractors, sub-contractors, middlemen, and other persons engaged in the hiring, employment, or superintendence of the labour of artificers (*q*).

(*c*) For the general law as to such societies, see title FRIENDLY SOCIETIES.

(*d*) See title CLUBS, Vol. IV., p. 410. As to certification of rules, see *ibid.* As to rules of friendly societies, see title FRIENDLY SOCIETIES; and see *Balchin* v. *Ebury* (*Lord*) (1903), 20 T. L. R. 60, 61. "The rules of the club" do not mean "the rules of the club certified by the Registrar of Friendly Societies on registration" (*ibid.*).

(*e*) The definition is as in the Truck Act, 1831 (1 & 2 Will. 4, c. 37), s. 25, p. 516, *ante* (Hosiery Manufacture (Wages) Act, 1874 (37 & 38 Vict. c. 48), s. 7).

(*f*) The definition is as in the Truck Act, 1831 (1 & 2 Will. 4, c. 37), s. 25, p. 516, *ante* (Hosiery Manufacture (Wages) Act, 1874 (37 & 38 Vict. c. 48), s. 7). As to wages generally, see title MASTER AND SERVANT.

(*g*) Hosiery Manufacture (Wages) Act, 1874 (37 & 38 Vict. c. 48), s. 1.

(*h*) For definition, see *infra*.

(*i*) For definition, see *infra*.

(*k*) Hosiery Manufacture (Wages) Act, 1874 (37 & 38 Vict. c. 48), s. 2.

(*l*) *Ibid.*, s. 3.

(*m*) *Ibid.*, s. 5; but nothing is to prevent the employer recovering any debt from the artificer in the ordinary way (*ibid.*, s. 6).

(*n*) *Willis* v. *Thorp* (1875), L. R. 10 Q. B. 383.

(*o*) Hosiery Manufacture (Wages) Act, 1874 (37 & 38 Vict. c. 48), s. 4.

(*p*) *Ibid.*, s. 7.

(*q*) *Ibid.*

Part VI.—Administration and Penalties.

SECT. 1.—*Notices, Registers, and Returns.*

SECT. 1. Notices, Registers, and Returns.

Notice of occupation.

1187. Within a month after a person begins to occupy a factory (*r*) or workshop (*s*) he must serve on the district inspector, under penalty of a fine not exceeding £5 (*a*), a written notice containing the name of the factory or workshop, the place where it is situate, the address to which letters are to be sent, the nature of the work, the nature and amount of the moving power therein, and the name of the person or firm under which the business of the factory or workshop is to be carried on (*b*). Where an inspector receives such notice in respect of a workshop, it is his duty forthwith to send the notice to the district council of the district in which the workshop is situate (*c*).

General register.

1188. In every factory and workshop (except domestic factories (*d*), domestic workshops (*e*), and men's workshops (*f*)), there is to be kept a register, called the general register, showing in the prescribed form the prescribed particulars as to the children and young persons employed (*g*), lime-washing (*h*), accidents of which notice is required to be sent to an inspector (*i*), special exceptions of which the occupier avails himself (*k*), and such other matters as may be prescribed (*l*). Entries made by the occupier or on his behalf are admissible against him as *primâ facie* evidence of the facts therein stated, and failure to make any required entry is admissible as *primâ facie* evidence that the provision relating thereto has not been observed (*m*). The register must be open to the inspection of the certifying surgeon of the district at all reasonable times (*n*); and the occupier must send such extracts therefrom to an inspector as he may require (*o*). For non-compliance with any of these provisions the occupier is liable to a fine not exceeding £5 (*p*).

Affixing of abstract and notices.

1189. There must be kept constantly affixed at the entrance of

(*r*) For definition, see p. 436, *ante*.
(*s*) For definition, see p. 441, *ante*.
(*a*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 127 (2). As to the recovery of fines, see p. 535, *post*.
(*b*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 127 (1). For a form of notice, see Encyclopædia of Forms and Precedents, Vol. X., p. 375.
(*c*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 127 (3).
(*d*) *Ibid.*, s. 111 (4). For definition, see p. 441, *ante*.
(*e*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 111 (4). For definition, see p. 442, *ante*.
(*f*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 157. For definition, see p. 443, *ante*.
(*g*) See pp. 487—509, *ante*.
(*h*) See pp. 449, 450, *ante*.
(*i*) See p. 472, *ante*.
(*k*) See p. 497, *ante*.
(*l*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 129 (1). (Such other matters are noted in the text in their appropriate places.)
(*m*) *Ibid.*, s. 129 (2).
(*n*) *Ibid.*, s. 129 (3).
(*o*) *Ibid.*, s. 129 (4).
(*p*) *Ibid.*, s. 129 (5). As to the recovery of fines, see p. 535, *post*.

SECT. 1. Notices. Registers, and Returns.

every factory and workshop (except domestic factories (*q*), domestic workshops (*r*), men's workshops (*s*), and certain institutions carried on for charitable or reformatory purposes (*t*)), and in such other parts thereof as an inspector directs, in the prescribed form and so as to be easily read, the prescribed abstract of the Factory and Workshop Act, 1901 (*u*), the names and addresses of the inspector and certifying surgeon, a notice of the clock (if any) by which the period of employment and meal times are regulated (*a*), and every notice and document required by the Acts to be affixed in the factory or workshop (*b*).

In tenement factories.

In tenement factories (*c*) the owner, instead of the occupier, is responsible for the affixing of the abstract and the notices as to the period of employment (*d*), times for meals (*e*), and system of employment of children (*f*), but any occupier may affix these notices in his own tenement, and thereupon they have effect with respect to persons employed by him in substitution for the corresponding notice affixed by the owner (*g*). For contravention the owner or the occupier, as the case may be, will be liable to a fine not exceeding 40*s*. (*h*).

Returns of persons employed.

1190. The occupier of every factory or workshop (men's workshops excepted(*i*)) and, if the Secretary of State so directs, the occupier of any place to which any of the provisions of the Acts apply, must, at such time as the Secretary of State may direct, at intervals of not less than one nor more than three years, send to the chief inspector of factories a correct return specifying the number of persons employed in the factory or workshop, and such further particulars relating to their age, sex, and occupations as the Secretary of State may direct (*k*). If the Secretary of State so directs, the intervals at which such returns are to be made may be the same as the intervals at which a census of production is directed to be taken (*l*). The penalty for default is a fine not exceeding £10 (*m*).

Charitable institutions.

1191. The managers of institutions carried on for charitable or reformatory purposes subject to the Acts as modified by an Order

(*q*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 111 (4). For definition, see p. 441, *ante*.
(*r*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 111 (4). For definition, see p. 442, *ante*.
(*s*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 157. For definition, see p. 443, *ante*.
(*t*) Factory and Workshop Act, 1907 (7 Edw. 7, c. 39), s. 5 (2) (c); and see p. 508, *ante*.
(*u*) 1 Edw. 7, c. 22.
(*a*) See p. 495, *ante*.
(*b*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 128 (1). Such other notices and documents as are required to be affixed are noted in the text.
(*c*) For definition, see p. 441, *ante*.
(*d*) See pp. 495, 497, *ante*.
(*e*) See pp. 495, 497, *ante*.
(*f*) See p. 495, *ante*.
(*g*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 87 (1).
(*h*) *Ibid.*, s. 128 (2).
(*i*) *Ibid.*, s 157. For definition, see p. 443, *ante*.
(*k*) Factory and Workshop Act, 1901, (1 Edw. 7, c. 22), s. 130.
(*l*) Census of Production Act, 1906 (6 Edw. 7, c. 49), s. 10; see also title TRADE AND TRADE UNIONS.
(*m*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 130.

of the Secretary of State (*n*) are required, not later than 15th January in each year, under penalty of a fine not exceeding £5, to send to the Secretary of State a correct return in the prescribed form, specifying the names of the managers, the name of the person in charge, and such particulars as to the number, age, sex, and employment of the inmates and other persons in the institution as the Secretary of State may require (*o*).

District council's registers of workshop.

1192. All district councils, and in London the Court of Common Council and the metropolitan borough councils (*p*), are required to keep a register of all workshops (*q*) in their district (*r*); and the medical officer of health of every such council is, in his annual report, to report specifically on the administration of the Acts in workshops and workplaces (*a*) and to send a copy thereof to the Secretary of State (*b*).

SECT. 2.—*Authorities and Officials.*

SUB-SECT. 1.—*Secretary of State.*

Powers of appointing inspectors.

1193. The Secretary of State, with the approval of the Treasury as to numbers and salaries, appoints (and, if necessary, removes) inspectors, clerks, and servants for the execution of the Acts, assigns to them their duties, and regulates the execution of their powers and duties under the Acts (*c*). Such annual report of the proceedings of the inspectors as the Secretary of State directs is laid before Parliament (*d*).

Special orders.

1194. Special Orders under the Acts are made under the hand of the Secretary of State and published in such manner as he thinks best adapted for informing all persons concerned. They must be laid before Parliament, and either House may annul them within forty days. A special Order may be temporary or permanent, conditional or unconditional, and, whether granting or extending an exception or prohibition, or directing the adoption of any special means or provision, or rescinding a previous Order, or effecting any other thing, may do so either wholly or partly. While in force, a special Order applies, so far as is consistent with the tenor thereof, as if it formed part of the enactment under which it was made (*e*).

SUB-SECT. 2.—*Local Authorities.*

Powers.

1195. For the purpose of their duties with respect to workshops and workplaces under the Acts, and under the law relating

(*n*) See p. 508, *ante*.
(*o*) Factory and Workshop Act, 1907 (7 Edw. 7, c. 39), s. 5 (2) (e).
(*p*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 153 (4).
(*q*) For definition, see p. 441, *ante*.
(*r*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 131. For a form of register, see Encyclopædia of Forms and Precedents, Vol. X., p. 375.
(*a*) See p. 445, *ante*.
(*b*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 132.
(*c*) *Ibid.*, s. 118 (1). The Factory and Workshops Acts are administered by the Home Office. The salaries and expenses are paid out of moneys voted by Parliament (*ibid.*, s. 118 (4)).
(*d*) *Ibid.*, s. 118 (7).
(*e*) *Ibid.*, s. 126.

SECT. 2. Authorities and Officials.

to public health, the district councils, and in London the Court of Common Council and the metropolitan borough councils (*f*) and their officers, have, without prejudice to their other powers, all such powers of entry, inspection, taking legal proceedings or otherwise, as a factory inspector (*g*). Powers conferred on those councils by the Acts are in addition to, and not in substitution for, any other powers which they may possess (*h*).

Duties as to workshops.

1196. If the medical officer of health of any such council becomes aware of any woman, young person, or child being employed in London (*i*) in a workshop and elsewhere (*k*) in a workshop in which no abstract of the Factory and Workshop Act, 1901 (*l*), is affixed (*m*), he must forthwith give written notice thereof to the factory inspector for the district (*l*).

Duties as to hours in shops.

1197. The council of any county or borough, and in the city of London the Court of Common Council, may appoint such inspectors as they think necessary for the execution of the Shops Regulation Acts, 1892—1904 (*n*), within their respective areas, with powers similar to those of factory inspectors (*o*). They must be furnished with certificates of appointment, to be produced if required (*p*). Where a closing order for shops (*q*) is in force in any metropolitan borough or urban district the county council may delegate those powers to the borough or district council, with or without restrictions or conditions (*r*).

SUB-SECT. 3.—*Factory Inspectors.*

Appointment.

1198. Factory inspectors are appointed by the Secretary of State (*s*), and notice of the appointment of every inspector must be published in the *London Gazette* (*s*). A person who is the occupier of or is employed in or about a factory or workshop, or is directly or indirectly interested therein or in any process or business carried on therein or in a patent connected therewith, cannot act as an

Who may not be appointed.

(*f*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 153 (4).
(*g*) *Ibid.*, s. 125. For powers of factory inspectors, see p. 529, *post.*
(*h*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 155.
(*i*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 27.
(*k*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 133. For a form of notice, see Encyclopædia of Forms and Precedents, Vol. X., p. 376.
(*l*) 1 Edw. 7, c. 22.
(*m*) See pp. 525, 526, *ante.*
(*n*) *I.e.*, Shop Hours Act, 1892 (55 & 56 Vict. c. 62); Shop Hours Act, 1893 (56 & 57 Vict. c. 67); Shop Hours Act, 1895 (58 & 59 Vict. c. 5); Seats for Shop Assistants Act, 1899 (62 & 63 Vict. c. 21); and Shop Hours Act, 1904 (4 Edw. 7, c. 31). See s. 10 of the last Act. As to these Acts, see pp. 509—512, *ante.*
(*o*) See p. 529, *post.*
(*p*) Shop Hours Act, 1892 (55 & 56 Vict. c. 62), s. 8; Shop Hours Act, 1904 (4 Edw. 7, c. 31), s. 8. Salaries and expenses are to be defrayed out of the county fund or borough fund or rate, as the case may be (Shop Hours Act, 1893 (56 & 57 Vict. c. 67), s. 2). Expenses under the Shop Hours Act, 1904 (4 Edw. 7, c. 31), incurred by a metropolitan borough council are to be defrayed as part of its expenses, and if incurred by an urban district council as part of the general expenses in executing the Public Health Acts (*ibid.*, s. 8). See also title LOCAL GOVERNMENT.
(*q*) See p. 510, *ante.*
(*r*) Shop Hours Act, 1904 (4 Edw. 7, c. 31), s. 9.
(*s*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 118.

inspector. Inspectors are not liable to serve in any parochial or municipal office. In Wales and Monmouthshire candidates having a knowledge of Welsh are preferred (*t*). Every inspector is furnished with a certificate of his appointment, which he must produce, if required so to do by the occupier, on applying for admission to a factory or workshop (*u*).

1199. A factory inspector has power to enter, inspect, and examine at all reasonable times, by day and night, a factory or workshop (*a*), and every part thereof, when he has reasonable cause to believe that any person is employed therein; to enter by day any place which he has reasonable cause to believe to be a factory or workshop; to take in with him a constable when he has reasonable cause to apprehend any serious obstruction; to require the production of the registers, certificates, notices, and documents kept in pursuance of the Acts, and to inspect, examine, and copy them; to make such examination and inquiry (either within the factory or workshop or not (*b*)) as may be necessary to ascertain whether the statutory provisions respecting the factory or workshop, and the persons therein employed, are complied with; to enter any school in which he has reasonable cause to believe that children employed in a factory or workshop are being educated; to examine, either alone or in the presence of any other party, every person whom he finds in a factory or workshop or such a school, or whom he has reasonable cause to believe to be, or to have been within the preceding two months, employed in a factory or workshop, and to require every such person to be so examined and to sign a declaration (*c*) of the truth of the matters respecting which he is so examined; and, generally, to exercise such powers as are necessary for carrying the Acts into effect (*d*).

Powers. Entry. Production of documents. Examination. Schools. Examination of employees.

In the case of an institution carried on for reformatory purposes, if the managers thereof give notice to the chief inspector of factories, an inspector will not be allowed, without the consent of the managers or of the person in charge, to examine an inmate save in the presence of one of the managers or of the person in charge; but this provision may be suspended in respect of any institution by the Secretary of State if he has reason to believe that a contravention of the Acts is taking place there (*e*); and in the case of premises subject to inspection by a Government Department (*f*), the Secretary of State may arrange with the Department concerned for the inspection of the premises by a factory inspector, and thereupon such inspector has the same right of entry and inspection as an inspector of the Department concerned (*g*).

Institutions.

(*t*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 118.
(*u*) *Ibid.*, s. 121.
(*a*) Including docks, buildings, and railways (*ibid.*, ss. 104—106; and see p. 441, *ante*), but not including quarries (Quarries Act, 1894 (57 & 58 Vict. c. 42), s. 3).
(*b*) *Squire* v. *Sweeney* (1899), 34 I. L. T. 26.
(*c*) As to the penalty for a false declaration, see p. 534, *post*.
(*d*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 119.
(*e*) Factory and Workshop Act, 1907 (7 Edw. 7, c. 39), s. 5 (2) (d).
(*f*) See p. 508, *ante*.
(*g*) Factory and Workshop Act, 1907 (7 Edw. 7, c. 39), s. 6.

SECT. 2. **Authorities and Officials.**

A factory inspector, if so authorised in writing by the Secretary of State, may conduct proceedings before magistrates (*h*).

Conduct of proceedings.

The occupier of every factory or workshop, his agents and servants, must furnish the means required by an inspector to carry out his duties (*i*).

Penalties for obstructing an inspector.

1200. If any person wilfully delays an inspector, or fails to comply with his requisition or to produce any certificate or document which he is required to produce, or conceals or prevents or attempts to conceal or prevent a woman, young person, or child from appearing before or being examined by an inspector, such person will be liable to a fine not exceeding £5; and the occupier of the factory or workshop where the inspector is so obstructed will be liable to a fine not exceeding £5, or, where the offence is committed at night (*k*), £20, or in the case of a domestic factory (*l*) or domestic workshop (*m*), £1 for an offence by day, or £5 for an offence by night. In the case of a second or subsequent conviction in relation to a factory within two years from the last conviction for the same offence, a fine not less than £1 will be imposed for each offence (*n*). But no one may be required to answer any question or give any evidence tending to criminate himself (*o*).

SUB-SECT. 4.—*Certifying Surgeons.*

Appointment.

1201. Subject to regulations made by the Secretary of State, the chief inspector of factories appoints a sufficient number of duly registered medical practitioners to be certifying surgeons for the purposes of the Acts, and he may revoke any such appointment. The Secretary of State may annul any such appointment or revocation upon appeal, and may make rules for the guidance of certifying surgeons in the discharge of their duties. A surgeon who is the occupier of a factory or workshop, or is directly or indirectly interested therein or in any process or business carried on therein or in a patent connected therewith, cannot be a certifying surgeon for that factory or workshop. Every certifying surgeon must, if directed by the Secretary of State, make any special inquiry and re-examine any young person or child; and he must make annually a report in the prescribed form to the Secretary of State as to the persons inspected during the year and the results of the inspection (*p*).

Powers.

1202. A certifying surgeon has the same powers as a factory inspector (*q*) for the purpose of examining any process in which a

(*h*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 120. As to proceedings before magistrates, see title MAGISTRATES.

(*i*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 119 (2).

(*k*) For definition, see p. 446, *ante*.

(*l*) For definition, see p. 441, *ante*.

(*m*) For definition, see p. 442, *ante*.

(*n*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 119 (3), (4).

(*o*) *Ibid.*, s. 119 (3). As to the duties of factory inspectors under the Truck Acts, see p. 519, *ante;* under the Employment of Children Act, 1903 (3 Edw. 7, c. 45), p. 487, *ante;* under the Elementary Education Acts, p. 489, *ante*.

(*p*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 122.

(*q*) See p. 529, *ante*.

child or young person presented to him for the grant of a certificate of fitness is proposed to be employed (*r*).

In institutions.

1203. In institutions carried on for charitable or reformatory purposes the medical officer of the institution (if any) may, on the application of the managers, be appointed by the chief inspector of factories to be the certifying surgeon therefor (*s*).

When poor law medical officer acts.

Where there is no certifying surgeon for a factory or workshop, the poor law medical officer for the district is to act for the time being in that capacity (*a*).

Fees.

1204. Fees are payable to the certifying surgeon by the occupier in respect of the examination of, and grant of certificates of fitness for employment for, young persons and children, and by the Secretary of State for examinations directed by him or for the investigation of accidents (*b*).

SECT. 3.—*Penalties.*

Factory or shop not kept in conformity with Acts.

1205. If a factory or workshop is not kept in conformity with the Acts (*c*), the occupier (*d*) thereof is liable to a fine (*e*), not exceeding £10, and, in the case of a second or subsequent conviction in relation to a factory within two years from the last conviction for the same offence, not less than £1 for each offence (*f*). In addition to, or instead of, inflicting such fine the court of summary jurisdiction may order the occupier to adopt certain means, within a limited time, for bringing his factory or workshop into conformity with the Acts, under a penalty not exceeding £1 a day during default (*g*).

Penal compensation in case of death or injury.

1206. If any person is killed or dies or suffers any bodily injury or injury to health in consequence of the occupier (*d*) having neglected to observe any of the statutory provisions or regulations relating to factories and workshops, that occupier is liable to a fine not exceeding £100, and, in the case of a second or subsequent conviction in relation to a factory within two years from the last conviction for the same offence, not less than £1 for each offence; and the whole or any part of the fine may be applied for the benefit of the injured person or of his family or otherwise, as the Secretary of State determines (*h*). The occupier will not be

(*r*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 64 (6).
(*s*) Factory and Workshop Act, 1907 (7 Edw. 7, c. 39), s. 5 (2).
(*a*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 123.
(*b*) *Ibid.*, s. 124. For the scale of fees, see *ibid.*, and the Fifth Schedule to the Act.
(*c*) The various circumstances under which a factory or workshop will be deemed not to be kept in conformity with those Acts are noted in their appropriate places throughout the text.
(*d*) For the meaning of this expression, see p. 447, and note (*l*), p. 447, *ante*. As to the liability of the owner in the case of tenement factories, see p. 532, *post*.
(*e*) As to the recovery of fines, see p. 535, *post*.
(*f*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 135 (1).
(*g*) *Ibid.*, s. 135 (2).
(*h*) *Ibid.*, s. 136. As to the right of a person injured, through a breach of a statutory duty, to maintain an action for negligence, see title NEGLIGENCE. As to an injured workman's rights under the Employers' Liability and Workmen's Compensation Acts, see title MASTER AND SERVANT.

SECT. 3. Penalties.

liable to a fine under this provision if an information against him in respect of the neglect has been dismissed previous to the time when the death or injury was inflicted; nor, in the case of injury to health, unless such injury was caused directly by the neglect (*i*). Contributory negligence in the person suffering the injury is no answer to a complaint under this provision (*k*).

Tenement factories.

1207. In tenement factories (*l*) it is the owner (*m*) (whether or not he is one of the occupiers), and not the occupier, who is liable for the observance and punishable for the non-observance (*n*) of the provisions as to the cleanliness, freedom from effluvia, overcrowding and ventilation of factories (*o*), including (so far as they relate to any engine-house, passage, or staircase, or to any room let to more than one tenant), the provisions with respect to limewashing and washing of the interior of a factory (*p*); the fencing of machinery and penal compensation for neglect to fence machinery in a factory (*q*), except such parts of the machinery as are supplied by the occupier; and the prevention of the inhalation of dust, gas, vapour, or other impurity, so far as that provision requires the supply of pipes or other contrivances necessary for working the fan or other means for that purpose (*a*). In the case of any tenement factory or class of tenement factories used wholly or partly for the weaving of cotton cloth, the Secretary of State may substitute the owner for the occupier for the purpose of enforcing the requirements as to ventilation (*b*), and the regulations for the protection of health in cotton cloth factories, or any order as to ventilation (*c*). The owner is also responsible for the maintenance of steam boilers and the registration of reports of examinations thereof (*d*), for the provision of means of escape in case of fire (*e*)

(*i*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 136. "It would seem that, but for the proviso (b) to s. 136, even the dismissal of a summons under s. 135 would not have prevented proceedings being taken under s. 136" (*R.* v. *Taylor*, [1908] 2 K. B. 237, *per* DARLING, J., at p. 243). S. 136 deals with an entirely distinct offence from that dealt with in s. 135. "S. 136 was intended to create fresh offences, and its operation is not limited to offences which can also be dealt with under s. 135" (*ibid.*, *per* Lord ALVERSTONE, C.J., at p. 242).

(*k*) *Blenkinsop* v. *Ogden*, [1898] 1 Q. B. 783. See also *Groves* v. *Wimborne* (*Lord*), [1898] 2 Q. B. 402, C. A., which was followed in *David* v. *Britannic Merthyr Coal Co.*, [1909] 2 K. B. 146, C. A., but the House of Lords, though affirming the decision, disapproved of the reason (*Britannic Merthyr Coal Co., Ltd.* v. *David*, [1910] A. C. 74); and see title NEGLIGENCE.

(*l*) For definition, see p. 441, *ante*.

(*m*) For definition, see p. 447, *ante*.

(*n*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 87.

(*o*) *I.e.*, those contained in *ibid.*, s. 1, for which see pp. 447—451, *ante*.

(*p*) *Ibid.*, s. 87.

(*q*) See p. 464, *ante*, and *supra*.

(*a*) See pp. 451, 476, *ante*.

(*b*) See p. 456, *ante*.

(*c*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 87 (3); and see p. 457, *ante*. No Order under this provision is at present in force.

(*d*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22) s. 11 (6); and see p. 467, *ante*.

(*e*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 14 (7); and see p. 468, *ante*.

in tenement factories and workshops, and for the observance of the regulations as to grinding in tenement factories (*f*).

Liability of owners of machine.

1208. Where in a factory the owner or hirer of a machine or implement moved by steam, water, or other mechanical power (*g*) is some person other than the occupier of the factory, the owner or hirer is deemed to be the occupier of the factory so far as respects any offence against the provisions of the Acts committed in relation to a person who is employed in or about or in connection with that machine or implement, and is in the employment or pay of the owner or hirer (*h*).

Employment contrary to Acts.

1209. Where a person is employed in a factory or workshop (other than a domestic factory (*i*) or domestic workshop (*k*)) contrary to the Acts, the occupier (*l*) of the factory or workshop will be liable to a fine not exceeding £3, or if the offence was committed during the night £5, for each person so employed. In the case of a domestic factory or domestic workshop the maximum fines are £1 for an offence by day and £2 for an offence by night. In the case of a second or subsequent conviction in relation to a factory or workshop (domestic or otherwise) within two years from the last conviction for the same offence, the fine must be not less than £1 for each offence (*m*).

Where there has in fact been employment contrary to the Acts, it is not open to a court of summary jurisdiction to dismiss the information on the ground that the occupier has used all possible means to carry out the provisions of those Acts, even though the offence is only a technical one (*n*).

Evidence of employment.

1210. A person who is found in a factory or workshop (other than a domestic factory or workshop), except at meal times or while all the machinery is stopped or for the sole purpose of bringing food to persons there employed between 4 p.m. and 5 p.m., will be deemed to have been employed in the factory or workshop until the contrary is proved; but yards, playgrounds and places open to the public view, schoolrooms, waiting-rooms, and other rooms belonging to the factory or workshop in which no machinery is used nor manufacturing process is carried on, are not to be taken to be part of the factory or workshop for the purposes of this provision (*o*).

(*f*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 88.

(*g*) See notes (*g*) and (*h*), p. 436, *ante*.

(*h*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 142.

(*i*) For definition, see p. 441, *ante*.

(*k*) For definition, see p. 442, *ante*.

(*l*) For the meaning of this expression, see p. 442, and note (*l*), p. 447, *ante*. Where there is more than one "occupier," the one who actually employed the person in question is alone responsible (*Fitton* v. *Wood* (1875), 32 L. T. 554).

(*m*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 137. As to the right of a person illegally employed, if he is injured by such employment, to recover damages, see title NEGLIGENCE.

(*n*) *Rogers* v. *Barlow & Son* (1906), 94 L. T. 519. But compare *Paterson* v. *Duke* (*D. & R.*) (1904), 6 Fraser (Justiciary Cases), 53.

(*o*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 147 (1).

SECT. 3. Penalties.

Age.

1211. Where a young person (*p*) or child (*q*) is, in the opinion of the court, apparently of the age alleged by the informant, it will lie on the defendant to prove the contrary (*r*). A declaration in writing by a certifying surgeon that he has personally examined a person employed in a factory or workshop, and believes him to be under the age set forth in the declaration, is admissible in evidence as to age (*s*).

Liability of parent.

1212. If a young person or child is employed in a factory or workshop contrary to the provisions of the Acts, the parent (*a*) will be liable to a fine not exceeding 20*s.* for each offence, unless it appears to the court that the offence was committed without the consent, connivance, or wilful default of the parent (*b*).

Liability of servant committing offence.

1213. Where an offence for which the occupier of a factory or workshop is liable has in fact been committed by some agent, servant, workman, or other person, that person will be liable to the like fine as if he were the occupier (*c*).

Exemption of occupier on conviction of actual offender.

The occupier of a factory or workshop who is charged with an offence against the Acts may, upon information laid by him, have any other person whom he charges as the actual offender brought before the court at the hearing; and if, after the offence has been proved, the occupier proves that he has used due diligence to enforce the provisions of the Acts, and that the said other person committed the offence in question without his knowledge, consent, or connivance, that other person will be convicted of the offence, and may be ordered to pay costs; and the occupier will be exempt from any fine (*d*). Where it appears to the satisfaction of an inspector at the time of discovering an offence that the occupier has used all due diligence to enforce the execution of the Acts, and that the offence has been committed without the knowledge, consent, or connivance of the occupier and in contravention of his orders, the inspector is to proceed against any person whom he believes to be the actual offender, without first proceeding against the occupier (*e*).

Forgeries, false entries and declarations.

1214. If any person forges or counterfeits any certificate for the purpose of the Acts (for which forgery or counterfeiting no other punishment is provided (*f*)), or gives or signs any such certificate, knowing it to be false in any material particular, or knowingly utters or makes use of any such forged or

(*p*) For definition, see p. 445, *ante*.
(*q*) For definition, see p. 445, *ante*.
(*r*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 147 (2).
(*s*) *Ibid.*, s. 147 (3). As to certificates of birth, see p. 489, *ante*.
(*a*) For definition, see p. 445, *ante*.
(*b*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 138 (1).
(*c*) *Ibid.*, s. 140.
(*d*) *Ibid.*, s. 141 (1). For the similar provisions in the Employment of Children Act, Truck Acts, and Shops Regulation Acts, see pp. 487, 509, 519, *ante*.
(*e*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 141 (2).
(*f*) The exception referred to is presumably the forgery of a birth certificate, which is made a felony by the Forgery Act, 1861 (24 & 25 Vict. c. 98), s. 36; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 741.

false certificate, or knowingly utters or makes use of, as applying to any person, a certificate which does not so apply, or personates any person named in a certificate, or falsely pretends to be an inspector, or wilfully connives at any of the foregoing offences, or wilfully makes a false entry in any register, notice, certificate, or document required by the Acts to be kept or served or sent, or wilfully makes or signs a false declaration under the Acts, or knowingly makes use of any such false entry or declaration, he will be liable to a fine not exceeding £20, or to imprisonment for a term not exceeding three months with or without hard labour (*g*).

Limit to accumulative fines.

1215. A person is not liable, in respect of a repetition of the same kind of offence from day to day, to any larger amount of fines than the highest fine fixed for the offence, except where the offence is repeated after an information has been laid for the previous offence, or where the offence is one of employing two or more persons contrary to the provisions of the Acts (*h*).

Procedure.

1216. Offences under the Acts are prosecuted, fines recovered, and summary orders made, in a court of summary jurisdiction in manner provided by the Summary Jurisdiction Acts (*i*), and there is an appeal to quarter sessions against any conviction or order (*k*). Fines, save as otherwise provided (*l*), are paid into the Exchequer (*m*).

Disqualification of justices.

The occupier of the factory or workshop in or with reference to which an offence is alleged, or his father, son, or brother, or a person engaged in, or an officer of any association engaged in, the same trade or occupation as a person charged with an offence, may not act as a justice in hearing and determining the charge (*n*).

Time for proceedings.

The information must be laid within three months after the offence comes to the knowledge (*o*) of the inspector for the district (*p*), or within two months after the conclusion of any inquest held in relation to the offence, but in no case later than six months after the offence (*q*).

It is sufficient to allege that a factory or workshop is a factory or

(*g*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 139. But for this express provision several of the offences referred to would be forgeries at common law; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 711, 767.

(*h*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 143.

(*i*) *Ibid.*, s. 144 (1), (2).

(*k*) *Ibid.*, s. 145; and see title MAGISTRATES.

(*l*) See, *e.g.*, p. 531, *ante*.

(*m*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 144 (3).

(*n*) *Ibid.*, s. 144 (4), (5).

(*o*) In the case of a continuing offence the time runs from the last occasion on which the inspector had knowledge of the facts (*Verney* v. *Fletcher* (*Mark*) *& Sons, Ltd.*, [1909] 1 K. B. 444).

(*p*) When the same facts give rise to separate offences under the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), ss. 135, 136 (see p. 531, *ante*), time will run from the date of the offence charged (*R.* v. *Taylor*, [1908] 2 K. B. 237; and see note (*i*), p. 532, *ante*). In the case of a continuing offence it will run from the last occasion on which the offence existed (*Higgins* v. *Northwich Union Guardians* (1870), 22 L. T. 752).

(*q*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 146 (1); and see, urther, titles MAGISTRATES; TIME.

SECT. 3. Penalties.

workshop within the meaning of the Acts (*r*), and to state the name of the ostensible occupier thereof or the title of the firm by which the occupier is known (*a*).

No *certiorari*.

1217. A conviction or order made either originally or on appeal is not to be quashed for want of form; and a conviction or order against which a person is authorised by the Acts to appeal is not to be removed by *certiorari* (*b*) or otherwise, except for the purpose of the hearing and determination of a special case (*c*).

Proof of conviction.

1218. A copy of a conviction for an offence under the Acts, purporting to be certified by the clerk of the peace having the custody of the conviction, is receivable as evidence; and is to be delivered by the clerk of the peace to an inspector on his written request and on payment of 1*s.* (*d*).

SECT. 4.—*Service of Documents.*

Service of documents.

1219. Documents for the purposes of the Acts may be served and sent by post, or by delivery at the residence of the person to be served, or (where he is the owner of a factory or workshop) by delivery of the document or a true copy thereof to his agent, or (where he is the occupier) to his agent or some person in the factory or workshop (*e*). When the owner of a tenement factory is made liable instead of the occupier, documents must be served on such owner (*f*). It is sufficient to address documents to the occupier without naming him (*g*).

(*r*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 146 (2).
(*a*) *Ibid.*, s. 146 (3).
(*b*) See title CROWN PRACTICE, Vol. X., p. 155.
(*c*) Factory and Workshop Act, 1901 (1 Edw. 7. c. 22), s. 146 (4).
(*d*) *Ibid.*, s. 147 (4). Other offences, with their consequent penalties, than those specified in this sub-section have been referred to in appropriate places throughout this title—*i.e.*, non-compliance with requirements as to sanitary conveniences (see p. 453, *ante*); contravention of provisions relating to cotton cloth and other humid factories (see p. 458, *ante*); bakehouses (see p. 458, *ante*); homework (see p. 461, *ante*); outworkers (see p. 463, *ante*); seats for shop assistants (see p. 463, *ante*); means of escape from fire (see p. 469, *ante*); dangerous machinery (see p. 471, *ante*); dangerous or unhealthy premises (see p. 471, *ante*); notification of accidents (see p. 473, *ante*); notification of boiler explosions (see p. 474, *ante*); unauthorised use of steam whistles (see p. 475, *ante*); notification of certain diseases by medical practitioner (see p. 476, *ante*); posting up or care of copies of regulations (see p. 482, *ante*); regulations relating to dangerous industries (see p. 482, *ante*); employment of children (see p. 487, *ante*); employment on holidays (see p. 496, *ante*); hours of employment in shops (see p. 509, *ante*); closing orders (see p. 511, *ante*); use of automatic indicator (see p. 513, *ante*); trade secrets (see p. 513, *ante*); Truck Acts (see p. 518, *ante*); production of contract for deduction from wages (see p. 522, *ante*); register of fines (see p. 522, *ante*); frames in hosiery trade (see p. 524, *ante*); notices, registers and returns (see pp. 525, 526, *ante*); and discharge of inspector's duty (see p. 530, *ante*).
(*e*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 148.
(*f*) *Ibid.*, s. 87 (4); and see p. 532, *ante*.
(*g*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 148.

FACTORS.

See AGENCY.

FACULTIES.

See ECCLESIASTICAL LAW.

FAIRS.

See MARKETS AND FAIRS.

FALSE IMPRISONMENT.

See TRESPASS.

FALSE PERSONATION.

See CRIMINAL LAW AND PROCEDURE; ELECTIONS.

FALSE PRETENCES.

See CRIMINAL LAW AND PROCEDURE.

FALSE REPRESENTATION.

See CRIMINAL LAW AND PROCEDURE; MISREPRESENTATION AND FRAUD.

FALSE RETURN.

See EXECUTION; SHERIFFS AND BAILIFFS.

FALSE STATEMENT.

See CRIMINAL LAW AND PROCEDURE; ELECTIONS; MISREPRESENTATION AND FRAUD.

FAMILY ARRANGEMENTS.

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Undue Influence	,,	CONTRACT; EQUITY; FRAUDULENT AND VOIDABLE CONVEYANCES; MISREPRESENTATION AND FRAUD; WILLS.
Voidable Conveyances	,,	FRAUDULENT AND VOIDABLE CONVEYANCES.

Part I.—Meaning and Formation.

SECT. 1. Introduction and Definition.

SECT. 1.—*Introduction and Definition.*

Principles governing family arrangements.

1220. Family arrangements are governed by principles which are not applicable to dealings between strangers (*a*). With reference to arrangements of this character, claims to upset them, and the rights of parties thereunder, the court considers what in the most extended view of the matter is most for the interest of families, and has regard to considerations which, in dealing with transactions between persons not members of the same family, would not be taken into account. Matters which would be fatal to the validity of similar transactions between strangers are not objections to the binding effect of family arrangements (*b*). It is the object of this title to set forth in what respect the law applicable to family arrangements differs from that applied to similar transactions not coming under this description.

Definition of family arrangements.

1221. A family arrangement is a transaction (*c*) between members of the same family which is for the benefit of the family generally, as, for example, one which tends to the preservation of the family property (*d*), to the peace or security of the family and the avoiding of family disputes and litigation (*e*), or to the saving of the honour of the family (*f*).

"Family."

The meaning of "family" is a wide one, including illegitimate members (*g*), and persons yet to be born (*h*).

(*a*) *Persse* v. *Persse* (1840), 7 Cl. & Fin. 279, H. L., *per* Lord COTTENHAM, L.C., at p. 318.

(*b*) *Jodrell* v. *Jodrell* (1851), 14 Beav. 397, 412; *Hoblyn* v. *Hoblyn* (1889), 41 Ch. D. 200, 204; see pp. 546 *et seq.*, *post*.

(*c*) Strictly the term should be applied to the agreement between the parties, but it is also used for the settlement declaring new uses or for the conveyance effectuating such an agreement.

(*d*) *Hoblyn* v. *Hoblyn*, *supra*.

(*e*) *Hoghton* v. *Hoghton* (1852), 15 Beav. 278.

(*f*) *Stapilton* v. *Stapilton* (1739), 1 Atk. 2.—The Encyclopædia of Forms and Precedents, Vol. II., contains the following precedents of family arrangements: p. 401, arrangement between heir-at-law and next of kin of intestate as to division of family property; p. 404, arrangement adopting an unattested will of an intestate; p. 405, arrangement varying trusts declared by a will; p. 408, arrangement with regard to expectations under a will or on the intestacy of a living person; p. 410, arrangement in respect of a settlement of ambiguous meaning; p. 413, arrangement extending the range of investments under a settlement (see also the same work, Vol. XIII., p. 702); p. 417, arrangement whereby beneficiaries put an end to trusts and divide property amongst them; p. 422, arrangement between widow (tenant for life) and children (remaindermen) of a small trader providing for continuation of the business of the deceased, instead of realising as directed by the will. A resettlement of family estates by a father and son, the father bringing property into settlement, will be found in the same work, Vol. XIII., p. 376, and a settlement by a settlor, in failing health, on his son, reserving annuities for members of the family, and with a covenant by the son to maintain the father, in the same work, Vol. XIII., at p. 586. As to the effect of a family arrangement in constituting the "predecessor" for the purpose of the payment of succession duty, see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 269.

(*g*) *Stapilton* v. *Stapilton*, *supra*; *Westby* v. *Westby* (1842), 2 Dr. & War. 502.

(*h*) *Re New*, *Re Leavers*, *Re Morley*, [1901] 2 Ch. 534, C. A.

SECT. 2.—*What are or are not Family Arrangements.*

SECT. 2. What are or are not Family Arrangements.

1222. In accordance with this definition, the following have been supported as family arrangements:—

Valid family arrangements.

The ordinary resettlement by tenant in tail on attaining twenty-one reducing his interest to a life estate, with remainder to his issue in tail (*i*), even though the resettlement provides a jointure for the mother of the tenant in tail, and limits the estate to his younger brothers and their issue in tail, in priority to his own daughters (*j*);

An agreement to provide for the sisters of the tenant in tail as part of a transaction resettling the family estates (*k*);

A settlement made by parents on the occasion of their child's marriage making provision for the mother, though outside the marriage consideration, on her giving up her right to dower in her husband's estate (*l*);

An agreement between father and son altering the limitations of a family settlement (*m*);

An agreement between father and son that property to which the former would become entitled as heir-at-law of a lunatic, and which formerly had been in the family, should be settled to the same uses as the family estates (*n*);

An agreement providing for payment of the son's debts in consideration of his giving up his interest in the family business (*o*);

A conveyance of the father's life estate to the son, a tenant in tail, in consideration of payment of the father's debts, provision being made for the father, mother, brothers, and sisters (*p*);

A covenant to settle property on a nephew alienated from his father by a marriage without his father's consent, in order to reconcile father and son (*q*);

A resettlement of the family property making provision for an illegitimate son (*r*);

Or a division of the family property for the same purpose (*s*).

(*i*) *Winnington* v. *Foley* (1719), 1 P. Wms. 536; see also the case referred to by Lord HARDWICKE as having occurred in Lord Cowper's time, in *Tendril* v. *Smith* (1740), 2 Atk. 85. For a precedent of such a resettlement, see Encyclopædia of Forms and Precedents, Vol. XIII., p. 376; see also title SETTLEMENTS.

(*j*) *Hartopp* v. *Hartopp* (1856), 21 Beav. 259. In this case a sum was provided for payment of the tenant in tail's debts, and for purchase of a commission in the army.

(*k*) *Wycherley* v. *Wycherley* (1763), 2 Eden, 175.

(*l*) *Jones* v. *Boulter* (1786), 1 Cox, Eq. Cas. 288.

(*m*) *Tendril* v. *Smith*, *supra*; *Davis* v. *Uphill* (1818), 1 Swan. 129.

(*n*) *Persse* v. *Persse* (1840), 7 Cl. & Fin. 279, H. L. As to dealings with expectancies, see title CHOSES IN ACTION, Vol. IV., p. 376.

(*o*) *Tennent* v. *Tennents* (1870), L. R. 2 Sc. & Div. 6.

(*p*) *Bellamy* v. *Sabine* (1847), 2 Ph. 425; *Wakefield* v. *Gibbon* (1857), 1 Giff. 401. For a precedent, see Encyclopædia of Forms and Precedents, Vol. XIII., p. 586.

(*q*) *Wiseman* v. *Roper* (1645), 1 Rep. Ch. 84 [158].

(*r*) *Stapilton* v. *Stapilton* (1739), 1 Atk. 2; *Westby* v. *Westby* (1842), 2 Dr. & War. 502.

(*s*) *Gordon* v. *Gordon* (1821), 3 Swan. 400. In this case the arrangement was set aside on the ground that one party thereto suppressed from the other material facts.

SECT. 2.
What are or are not Family Arrangements.

Family arrangements as to division of property.

1223. The following arrangements for division of property have been supported:—

An agreement for the division of family property by way of compromise of a family quarrel or litigation about a disputed will (*t*), or even to prevent family friction, where there is no question as to the devolution of the property nor any disputed right, there being some consideration for the arrangement other than love and affection (*u*), or any arrangement as to division of property where the construction of a will or other instrument under which the parties claim is doubtful (*v*);

An agreement dividing up family property, though entered into under a misapprehension of the legal rights of the parties, provided such misapprehension is not induced by any party to the agreement (*x*), even where the fact that misapprehension existed has been established by subsequent legal decision (*y*);

An agreement between members of a family to divide equally whatever they obtain under the will of an ancestor (*a*);

An agreement between co-heiresses dividing the property between them (*b*);

An agreement between the heir-at-law and a person supposed to be entitled under a lost will dividing the property between themselves and other members of the family (*c*);

An agreement dividing the family property between members of the family where some of the members had a title independently of the will of their father, who purported to dispose of the whole among his sons and daughters (*d*).

(*t*) *Cann* v. *Cann* (1721), 1 P. Wms. 723; *Pullen* v. *Ready* (1743), 2 Atk. 587; *Gascoyne* v. *Chandler* (1755), 3 Swan. 418, n.; *Neale* v. *Neale* (1837), 1 Keen, 672; *Wilcocks* v. *Carter* (1875), L. R. 19 Eq. 327, overruled on the construction of the agreement of compromise (1875), 10 Ch. App. 440.

(*u*) *Williams* v. *Williams* (1867), 2 Ch. App. 294. For a precedent varying the trusts of the family property declared by a will, see Encyclopædia of Forms and Precedents, Vol. II., p. 405.

(*v*) *Gibbons* v. *Caunt* (1799), 4 Ves. 840; *Stockley* v. *Stockley* (1812), 1 Ves. & B. 23; *Hotchkis* v. *Dickson* (1820), 2 Bli. 303, H. L.; *Fowler* v. *Fowler* (1859), 4 De G. & J. 250; *Partridge* v. *Smith* (1863), 11 W. R. 714. If the parties had not present to their minds the doubts alleged to be compromised, the transaction cannot be supported as a family arrangement (*Harvey* v. *Cooke* (1827), 4 Russ. 34; *Ashurst* v. *Mill* (1848), 7 Hare, 502). For a precedent of a family arrangement in respect of a settlement of ambiguous meaning, see Encyclopædia of Forms and Precedents, Vol. II., p. 410.

(*x*) *Frank* v. *Frank* (1667), 1 Cas. in Ch. 84; see *Stephens* v. *Bateman* (*Lord*) (1778), 1 Bro. C. C. 22; *Stewart* v. *Stewart* (1839), 6 Cl. & Fin. 911, H. L.; *Bentley* v. *Mackay* (1862), 8 Jur. (N. S.) 857, 1001, C. A.

(*y*) *Lawton* v. *Campion* (1854), 18 Beav. 87.

(*a*) *Beckley* v. *Newland* (1723), 2 P. Wms. 182 (this case is treated as an example of a family arrangement in *Hoghton* v. *Hoghton* (1852), 15 Beav. 278, 301, though this is not the ground upon which the judgment proceeded); *Harwood* v. *Tooke* (1812), 2 Sim. 192; *Wethered* v. *Wethered* (1828), 2 Sim. 183; *Higgins* v. *Hill* (1887), 56 L. T. 426. For a precedent, see Encyclopædia of Forms and Precedents, Vol. II., p. 408.

(*b*) *Head* v. *Godlee* (1859), John. 536.

(*c*) *Heap* v. *Tonge* (1851), 9 Hare, 90. For a precedent of an arrangement adopting an unattested will of an intestate, see Encyclopædia of Forms and Precedents, Vol. II., p. 404.

(*d*) *Houghton* v. *Lees* (1854), 1 Jur. (N. S.) 862.

1224. The following cannot be supported as family arrangements:—

Arrangements which are invalid family arrangements.

A transaction between father, tenant for life, and son, tenant in tail, whereby money is borrowed on the security of the settled estates, exclusively for the benefit of the father (*e*);

A resettlement of the family estates reserving great benefits for the father, through whose influence the settlement was effected (*f*);

Any other dealing between parent and child before the latter is fully emancipated exclusively for the advantage of the parent (*g*);

A purchase by a tenant for life from a reversioner, although the object is the laudable one of preventing the estate being sold out of the family (*h*), and even although the debts of the son, tenant in tail, are paid out of the purchase-money, and some other property is secured to the son (*i*);

A compromise of a claim to estates founded on a mistake as to title induced by misrepresentation of one of the parties to the compromise (*k*);

An agreement to divide property founded on erroneous advice as to the rights of the parties on an intestacy (*l*) or under a will or other document (*m*);

(*e*) *Savery* v. *King* (1856), 5 H. L. Cas. 627.

(*f*) *Hoghton* v. *Hoghton* (1852), 15 Beav. 278. *Kinchant* v. *Kinchant* (1784), 1 Bro. C. C. 369, is to the contrary; this case, however, was decided by GOULD, J., in the absence of Lord THURLOW, and was disapproved of by Lord KENYON (as Sir P. ARDEN, M.R., said in *Brown* v. *Carter* (1801), 5 Ves. 862, at p. 877), "with some reason." *Dimsdale* v. *Dimsdale* (1856), 3 Drew. 556, shows how part of a series of transactions may be upheld as a family arrangement while other parts cannot be upheld on that ground. In *Jenner* v. *Jenner* (1860), 2 Giff. 232, affirmed on appeal 2 De G. F. & J. 359, the provision for the benefit of the father was not complained of, and the court refused to set aside the settlement. Had the provision been impeached, the decision might have been different. In *Hoblyn* v. *Hoblyn* (1889), 41 Ch. D. 200, the father gave up the provision for his benefit, and the mother her jointure, and thereupon an action to set aside the settlement was dismissed.

(*g*) *Baker* v. *Bradley* (1855), 7 De G. M. & G. 597, C. A.; *Davies* v. *Davies* (1863), 4 Giff. 417; *Chambers* v. *Crabbe* (1865), 34 Beav. 457; *Bainbrigge* v. *Brown* (1881), 18 Ch. D. 188; *Powell* v. *Powell*, [1900] 1 Ch. 243. In the following cases there was long acquiescence, and the transaction was upheld:—*Brown* v. *Carter* (1801), 5 Ves. 862; *Palmer* v. *Wheeler* (1811), 2 Ball & B. 18; *Tweddell* v. *Tweddell* (1822), Turn. & R. 1; *Wright* v. *Vanderplank* (1855), 2 K. & J. 1, affirmed (1856), 8 De G. M. & G. 133, C. A.; *Potts* v. *Surr* (1865), 34 Beav. 543; *Turner* v. *Collins* (1871), 7 Ch. App. 329. The law as to such transactions between parent and child will be found under the titles FRAUDULENT AND VOIDABLE CONVEYANCES and INFANTS AND CHILDREN.

(*h*) *Talbot* v. *Staniforth* (1861), 1 John. & H. 484.

(*i*) *Playford* v. *Playford* (1845), 4 Hare, 546. In the case of *Willoughby* v. *Brideoake* (1865), 11 Jur. (N. S.) 524, which appears at variance with *Playford* v. *Playford*, *supra*, the court refused to set aside such a purchase as against a purchaser from the father after a delay of seventeen years, but on appeal (11 Jur. (N. S.) 706, C. A.) the decision of the court below was affirmed without prejudice to any question between the son and his father's estate.

(*k*) *Leonard* v. *Leonard* (1812), 2 Ball & B. 171. As to misrepresentation generally, see title MISREPRESENTATION AND FRAUD.

(*l*) *Lansdown* v. *Lansdown* (1730), Mos. 364; *Cocking* v. *Pratt* (1750), 1 Ves. Sen. 400.

(*m*) *Re Roberts*, *Roberts* v. *Roberts*, [1905] 1 Ch. 704, C. A.

SECT. 2. What are or are not Family Arrangements.

An agreement as to division of property where the heir gave up property to which he had undoubted rights without consideration, and where he was ignorant, a drunkard, and without professional assistance, though there was no evidence of fraud or undue influence (*n*);

Long-continued acquiescence in the division of family property in accordance with an erroneous view of the law, without any intention of compromising a doubtful claim (*o*);

An agreement as to family property not executed by all the intended parties thereto (*p*).

SECT. 3.—*Formalities.*

Formalities.

1225. The necessary and sufficient formalities of a family arrangement are the same generally as those of any contract relating to the same subject-matter (*q*). Thus, where land is concerned, writing is necessary (*r*), except that, in an action for specific performance of the arrangement, the absence of writing will not be a defence where acts amounting to part performance have been done either by the plaintiff or for the benefit of the defendant (*s*). Where land is not concerned writing is not necessary (*t*).

Family arrangements not implied from course of dealing.

There must be a concluded agreement between the parties on the point in dispute (*u*); an arrangement is not implied from a mere course of dealing (*a*), except that, in some cases, third parties acquiring rights under such a course of dealing will be protected (*b*).

SECT. 4.—*Parties.*

Parties.

1226. Any members of a family may be parties to a family arrangement. Thus agreements between husband and wife (*c*),

(*n*) *Dunnage* v. *White* (1818), 1 Swan. 137.

(*o*) *Bullock* v. *Downes* (1860), 9 H. L. Cas. 1; *Heald* v. *Walls* (1870), 39 L. J. (CH.) 217. Though in such a case the court may not direct the payments to be refunded (*Clifton* v. *Cockburn* (1834), 3 My. & K. 76; *Rogers* v. *Ingham* (1876), 3 Ch. D. 351, C. A.). As to acquiescence generally, see title EQUITY, Vol. XIII., p. 169.

(*p*) *Peto* v. *Peto* (1849), 16 Sim. 590. In *Bolitho* v. *Hillyar* (1865), 34 Beav. 180, four of the parties executing were under coverture.

(*q*) See titles CONTRACT, Vol. VII., pp. 327 *et seq.*, 360, 361; DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 361.

(*r*) Statute of Frauds (29 Car. 2, c. 3), s. 4.

(*s*) *Stockley* v. *Stockley* (1812), 1 Ves. & B. 23; *Neale* v. *Neale* (1837), 1 Keen, 672; *Williams* v. *Williams* (1867), 2 Ch. App. 294. An early case is *Thomas* v. *Gyles* (1691), 2 Vern. 232. As to specific performance generally, see title SPECIFIC PERFORMANCE.

(*t*) *Gibbons* v. *Caunt* (1799), 4 Ves. 840.

(*u*) *Heald* v. *Walls* (1870), 39 L. J. (CH.) 217.

(*a*) *Bullock* v. *Downes* (1860), 9 H. L. Cas. 1; *Re Moulton, Grahame* v. *Moulton* (1906), 94 L. T. 454, C. A. A course of dealing is strong evidence, however, of an agreement in existence (*Miller* v. *Harrison* (1871), 5 I. R. Eq. 324).

(*b*) *Clifton* v. *Cockburn* (1834), 3 My. & K. 76, where family arrangements had taken place under a mistaken construction of a settlement.

(*c*) *Jodrell* v. *Jodrell* (1845), 9 Beav. 45; *Jodrell* v. *Jodrell* (1851), 14 Beav. 397; *Harrison* v. *Harrison*, [1910] 1 K. B. 35.

parent and child (*d*) legitimate or illegitimate (*e*), uncle and nephews and nieces (*f*), co-heiresses (*g*), brothers (*h*), have all been supported as family arrangements.

Arrangements between husband and wife as to the payment of the husband's debts out of the wife's property are subject to a *primâ facie* inference, if the circumstances of the case warrant it, that she is to have the right to have her property exonerated by him (*i*).

Parties under disability.

1227. In cases of disability the arrangement may usually be made subject to the sanction of the court (*j*).

If a party is under disability at the time of execution, and it is to his or her interest to repudiate the arrangement, repudiation may be inferred or not according to the rules applicable to other contracts of such persons (*k*).

It is no objection that one of the parties is a reversioner, or an expectant heir (*l*).

The interests of persons unborn may be altered in some cases with the sanction of the court (*m*).

The court has jurisdiction to alter the interests of infants in pursuance of an arrangement, whether the arrangement involves a compromise (*n*) or not (*o*).

Benefits to persons not parties.

1228. Persons not parties to a family arrangement may take benefits thereunder and be within the consideration of the family contract (*p*), or otherwise may be able to enforce it (*q*), but, unless they are members of the family, the considerations applicable to family arrangements do not arise in their favour on a question as to the validity of the arrangement (*r*).

(*d*) *Hartopp* v. *Hartopp* (1856), 21 Beav. 259; but as to the limits within which such arrangements must be made, see p. 549, *post*.

(*e*) *Stapilton* v. *Stapilton* (1739), 1 Atk. 2; *Heap* v. *Tonge* (1851), 9 Hare, 90. For bastardy agreements, see title BASTARDY, Vol. II., p. 441.

(*f*) *Lawton* v. *Campion* (1854), 18 Beav. 87; *Wiseman* v. *Roper* (1645), 1 Rep. Ch. 84 [158].

(*g*) *Head* v. *Godlee* (1859), John. 536.

(*h*) *Cann* v. *Cann* (1721), 1 P. Wms. 723.

(*i*) *Paget* v. *Paget*, [1891] 1 Ch. 470, C. A.; see title HUSBAND AND WIFE. Separation agreements are excluded from the present heading, and will be found treated under title HUSBAND AND WIFE.

(*j*) See Yearly Practice of the Supreme Court, 1911, pp. 155 *et seq.*; *Re Birchall, Wilson* v. *Birchall* (1880), 16 Ch. D. 41.

(*k*) See title INFANTS AND CHILDREN.

(*l*) *Tweddell* v. *Tweddell* (1822), Turn. & R. 1; *Bellamy* v. *Sabine* (1847), 2 Ph. 425, 439; *Willoughby* v. *Brideoake* (1865), 11 Jur. (N. S.) 524, and on appeal, *ibid.*, 706, C. A. See, however, *Talbot* v. *Staniforth* (1861), 1 John. & H. 484; *Playford* v. *Playford* (1845), 4 Hare, 546. As to the rule in ordinary cases with regard to dealings with reversioners and expectant heirs see titles FRAUDULENT AND VOIDABLE CONVEYANCES; MONEY AND MONEY-LENDING.

(*m*) *Re Wells, Boyer* v. *Maclean*, [1903] 1 Ch. 848; *Re New, Re Leavers, Re Morley*, [1901] 2 Ch. 534, C. A.

(*n*) See title INFANTS AND CHILDREN.

(*o*) *Re Wells, Boyer* v. *Maclean, supra*.

(*p*) *Heap* v. *Tonge, supra*.

(*q*) *Priestley* v. *Ellis*, [1897] 1 Ch. 489.

(*r*) *Willis* v. *Barron*, [1902] A. C. 271.

SECT. 4. Parties.

All parties must adopt the arrangement.

1229. Unless the arrangement expressly or impliedly provides that each party shall be bound whether all concur or not (*s*), all parties must either execute it (*t*) or do acts adopting it (*u*); otherwise the agreement will not be binding even on those who do execute the document. The execution of the arrangement or acts adopting it will be ineffective if the person concerned is not *sui juris* (*v*).

Part II.—Validity and Effect.

SECT. 1.—*Attitude of the Court.*

Court favours family arrangements.

1230. The court (*w*) will support as a family arrangement any transaction between members of the same family which is generally for the benefit of the family estate or of all the parties concerned (*a*).

The court does not apply the peculiar considerations which have weight in supporting a family arrangement where the arrangement gives a bounty to a parent or head of the family, through whose influence the arrangement was effected (*b*). In such cases the transaction is regarded from the same standpoint as a dealing between parent and child, which, if the child be not fully emancipated, is jealously criticised (*c*). If, however, the benefit be derived from an agreement between the children themselves and as part of the bargain which produced the deed, it is unobjectionable (*d*). Cases where there are circumstances involving inferiority of position on the part of some member of the family are hereafter dealt with (*e*).

Considerations to which court gives weight.

1231. Considerations to which the court gives weight, and which influence the court favourably, are that disputes are avoided in the family (*f*); that the honour of the family is safeguarded (*g*), or that

(*s*) Compare Encyclopædia of Forms and Precedents, Vol. XI., p. 483, for such a provision.

(*t*) *Peto* v. *Peto* (1849), 16 Sim. 590.

(*u*) *Dimsdale* v. *Dimsdale* (1856), 3 Drew. 556; *Westby* v. *Westby* (1842), 2 Dr. & War. 502.

(*v*) *Bolitho* v. *Hillyar* (1865), 34 Beav. 180.

(*w*) As to actions in respect of family arrangements, see also p. 552, *post*.

(*a*) *Westby* v. *Westby*, *supra*; *Hoblyn* v. *Hoblyn* (1889), 41 Ch. D. 200.

(*b*) *Hoghton* v. *Hoghton* (1852), 15 Beav. 278; *Wycherley* v. *Wycherley* (1763), 2 Eden, 175, 180; *Turner* v. *Collins* (1871), 7 Ch. App. 329.

(*c*) *Archer* v. *Hudson* (1844), 7 Beav. 551; *Baker* v. *Bradley* (1855), 7 De G. M. & G. 597, C. A.; *Hoblyn* v. *Hoblyn*, *supra*. As to such dealings, see titles CONTRACT, Vol. VII., pp. 357 *et seq.*; EQUITY, Vol. XIII., p. 18; INFANTS AND CHILDREN.

(*d*) *Davis* v. *Uphill* (1818), 1 Swan. 129.

(*e*) See pp. 549 *et seq.*, *post*.

(*f*) *Hoghton* v. *Hoghton*, *supra*; *Neale* v. *Neale* (1837), 1 Keen, 672.

(*g*) *E.g.*, where provision is made for an illegitimate child (*Stapilton* v. *Stapilton* (1739), 1 Atk. 2), or a question of an invalid marriage is settled (*Westby* v. *Westby*, *supra*).

various obligations, morally binding on a family, are provided for (*h*); or that the family property is continued in the family (*i*).

SECT. 1. Attitude of the Court.

SECT. 2.—*Consideration.*

Consideration for family arrangement

1232. Since the calculation of profit and loss constitutes only part of what influenced the parties, family arrangements are not viewed strictly in respect of the necessity for consideration (*j*). In general the absence or inadequacy of the consideration is not inquired into (*k*): it can only be so inquired into where the inadequacy is such as to involve the conclusion that the party either did not understand what he was about, or was the victim of some imposition (*l*).

Compromise of doubtful rights.

The intention to compromise doubtful rights is sufficient consideration, and the agreement will be enforceable though the rights turn out to be different from what they were thought to be (*m*). There must, however, be an intention to compromise such

(*h*) *E.g.*, in *Hartopp* v. *Hartopp* (1856), 21 Beav. 259, by the resettlement made shortly after the tenant in tail attained twenty-one, a jointure was secured to his mother, and the interest of his daughters was postponed to that of his younger brothers. In *Wycherley* v. *Wycherley* (1763), 2 Eden, 175, provision was made in the settlement for the tenant in tail's sisters. Inasmuch as these provisions were not for the benefit of the persons through whose influence the settlements were procured, they were not considered objections to the arrangement. In *Hoblyn* v. *Hoblyn* (1889), 41 Ch. D. 200, KEKEWICH, J., at p. 204, states that the duty to provide for those members of the family who are not intended to succeed to the family property is one recognised by the court.

(*i*) *Hoghton* v. *Hoghton* (1852), 15 Beav. 278, *per* Sir JOHN ROMILLY, at pp. 300, 307; *Dimsdale* v. *Dimsdale* (1856), 3 Drew. 556, *per* KINDERSLEY, V.-C., at p. 569; *Hoblyn* v. *Hoblyn*, *supra*, *per* KEKEWICH, J., at p. 204. An arrangement by which an extravagant son was excluded from his interest in the family business, thus preserving it for the rest of the family, was supported in *Tennent* v. *Tennents* (1870), L. R. 2 Sc. & Div. 6. See further examples of family arrangements on p. 541, *ante*.

(*j*) *Persse* v. *Persse* (1840), 7 Cl. & Fin. 279, 318, H. L.; *Bellamy* v. *Sabine* (1847), 2 Ph. 425. The law as to consideration in contracts generally, which, subject to the above paragraph, holds good in regard to family arrangements, will be found in title CONTRACT, Vol. VII., p. 383. As to considerations in transactions regarded as purchases thus creating exceptions from the charge of estate duty, see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 196.

(*k*) *Houghton* v. *Lees* (1854), 1 Jur. (N. S.) 862; *Wycherley* v. *Wycherley*, *supra*; *Stephens* v. *Bateman* (*Lord*) (1778), 1 Bro. C. C. 22.

(*l*) *Tennent* v. *Tennents*, *supra*, *per* Lord WESTBURY, at p. 9.

(*m*) *Lawton* v. *Campion* (1854), 18 Beav. 87; *Houghton* v. *Lees*, *supra*. In *Naylor* v. *Winch* (1824), 1 Sim. & St. 555, Sir JOHN LEACH, V.-C., at pp. 564, 565, 566, said: "When a doubtful question arises, such as this question of construction upon the will of the testator, it is extremely reasonable that the parties should terminate their differences by dividing the stake between them in the proportions which may be agreed upon. . . . Where a compromise of a doubtful claim is entered into fairly and with due deliberation and upon consideration, a court of justice cannot inquire into the supposed adequacy or inadequacy of the consideration. Where is it to find a scale for determining the true measure of adequacy? If a court is in such a case to be governed by its judicial opinion upon the rights of the parties, then to him who by that opinion is held to be entitled to the whole property no consideration can be really adequate which is less than the whole, and no compromise can ever bind the successful claimant." To the same effect see *Stapilton* v. *Stapilton* (1739), 1 Atk. 2, *per* Lord HARDWICKE, L.C. This was said without reference to the considerations which influence the court in upholding family agreements. How

SECT. 2. Consideration.

rights, and not a mere agreement fixing the amount to which a party is entitled on a particular interpretation of those rights, adopted by the parties as unquestionable (*n*). In such a case the collateral point of the extent of the right will be left open, and the agreement will not preclude a subsequent action to determine the right. Similarly, in cases of agreements with residuary legatees or next of kin fixing the amounts of their shares, a question which was not within the contemplation of the parties will not be deemed concluded by a release or compromise, though in general terms (*o*).

Concurrence of members of family.

As between two parties the concurrence of another member of the family is sufficient consideration if such member brings property into the arrangement or if, without such member's concurrence, the arrangement could not be effectuated (*p*).

Stat. 27 Eliz. c. 4.

A family arrangement disposing of land was not voluntary under the statute 27 Eliz. c. 4, against subsequent assignees for value (*q*).

SECT. 3.—*Essential Requirements.*

Family arrangement must be mutual and reasonable.

1233. In order to be enforceable as a family arrangement the agreement must be mutually enforceable (*r*); there must be no defect in the negotiations leading up to the arrangement caused by any party being in an inferior position by reason of undue influence, drunkenness, ignorance, non-disclosure or misrepresentation (*s*); and the contents of the agreement must be reasonable having regard to all the circumstances (*t*), but not necessarily usual in like cases (*a*).

Provisions held unreasonable.

The following provisions have been considered unreasonable in a resettlement:—The limitation of a remainder in fee on failure of male issue of the son in favour of the father, through whose influence the resettlement was effected (*b*), or the reservation in favour of the father of a power of appointment in default of issue

much, *a fortiori*, the reasoning applies to family arrangements was pointed out by Sir JOHN STUART, V.-C., in *Houghton* v. *Lees* (1854), 1 Jur. (N. S.) 862. As to compromises as constituting consideration, generally, see title CONTRACT, Vol. VII., p. 387.

(*n*) *Lawton* v. *Campion* (1854), 18 Beav. 87; *Bennett* v. *Merriman* (1843), 6 Beav. 360.

(*o*) *Cocking* v. *Pratt* (1750), 1 Ves. Sen. 400; *Bennett* v. *Merriman*, *supra*; *Lindo* v. *Lindo* (1839), 1 Beav. 496.

(*p*) *Williams* v. *Williams* (1867), 2 Ch. App. 294 (a widow concurring in an agreement between two sons to relinquish her rights); *Heap* v. *Tonge* (1851), 9 Hare, 90.

(*q*) *Heap* v. *Tonge*, *supra*; *Bennett* v. *Bernard* (1848), 10 I. Eq. R. 584. By the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), s. 2, a voluntary conveyance made *bonâ fide* and without any fraudulent intent is not to be deemed fraudulent or covinous within the meaning of the statute (1584-1585) 27 Eliz. c. 4; the expression "conveyance" including every mode of disposition mentioned or referred to in the latter Act, namely, every conveyance, grant, charge, lease, incumbrance, and limitation of uses. See, further, title FRAUDULENT AND VOIDABLE CONVEYANCES.

(*r*) *Stapilton* v. *Stapilton* (1739), 1 Atk. 2; *Bolitho* v. *Hillyar* (1865), 34 Beav. 180.

(*s*) *Hartopp* v. *Hartopp* (1856), 21 Beav. 259; *Tweddell* v. *Tweddell* (1822), Turn. & R. 1; see pp. 549 *et seq.*, *post*.

(*t*) *Stapilton* v. *Stapilton*, *supra*; *Hoghton* v. *Hoghton* (1852), 15 Beav. 278.

(*a*) *Hoblyn* v. *Hoblyn* (1889), 41 Ch. D. 200.

(*b*) *Wycherley* v. *Wycherley* (1763), 2 Eden, 175; *Hoghton* v. *Hoghton*, *supra*.

male of the son (*c*), or on failure of issue generally (*d*), or a power to appoint an annual sum out of the rents (*e*). On the other hand, a power to charge a fixed sum on property settled may not be unreasonable if the father brings other property into settlement (*f*) and is not so if the power is exercisable in favour of brothers and sisters (*g*), or where the father personally derives no benefit from the exercise of the power (*h*).

SECT. 4.—*Parental and other Influence, Drunkenness, Ignorance etc.*

Parental influence.

1234. Parental influence is inseparable from most cases of family arrangement, and the exercise of it is no objection to the arrangement when the benefits obtained are for third persons (*i*), even though the influence amount to strong pressure (*k*). If the parent derives some benefit, the question whether that is fatal to the validity of the arrangement must be determined by the principles applicable to ordinary cases where transactions between parent and child for the benefit of the former are impeached (*l*).

Other influence.

1235. Influence other than parental is generally subject to the usual rules applicable to ordinary contracts (*m*).

Drunkenness.

1236. Additional care is necessary on the part of other parties in case a party be drunk or addicted to drink, for the state of such a person's mind and the circumstances are considered even if he is sober at the time (*n*). If the party is made drunk for the purpose, the arrangement is voidable (*o*); but it is not voidable if no unfair advantage is taken, and the arrangement is reasonable (*p*).

(*c*) *Hoghton* v. *Hoghton* (1852), 15 Beav. 278, 307.

(*d*) *Fane* v. *Fane* (1875), L. R. 20 Eq. 698.

(*e*) *Hoghton* v. *Hoghton*, *supra*.

(*f*) *Hoblyn* v. *Hoblyn* (1889), 41 Ch. D. 200, 209.

(*g*) *Hoblyn* v. *Hoblyn*, *supra*.

(*h*) *Tennent* v. *Tennents* (1870), L. R. 2 Sc. & Div. 6.

(*i*) *I.e.*, persons other than the parent through whose influence the arrangement was brought about, for example mother, brothers, sisters, or other collateral relatives (*Hartopp* v. *Hartopp* (1856), 21 Beav. 259; *Tendril* v. *Smith* (1740), 2 Atk. 85; *Hoghton* v. *Hoghton*, *supra*; *Jenner* v. *Jenner* (1860), 2 Giff. 232, affirmed on appeal, 2 De G. F. & J. 359; *Fane* v. *Fane*, *supra*, *per* HALL, V.-C., at p. 706; *Hoblyn* v. *Hoblyn*, *supra*, at p. 206).

(*k*) *Wycherley* v. *Wycherley* (1763), 2 Eden, 175 (warmth of temper without improper exercise of influence). The influence may, on the other hand, be equally effectual though silent (*Hartopp* v. *Hartopp*, *supra*).

(*l*) *Hoghton* v. *Hoghton*, *supra*, *per* Sir JOHN ROMILLY, at p. 306; *Dimsdale* v. *Dimsdale* (1856), 3 Drew. 556, 571; *Hoblyn* v. *Hoblyn*, *supra*. A benefit so obtained may be given up, and the rest of the deed may stand. For the law as to transactions between parent and child, see titles FRAUDULENT AND VOIDABLE COMPANIES; INFANTS AND CHILDREN. As to frauds on powers, see title POWERS.

(*m*) *Bentley* v. *Mackay* (1862), 31 Beav. 143, affirmed 8 Jur. (N. S.) 1001, C. A. (though in this case the agreement was not set aside); *Ellis* v. *Barker* (1871), 7 Ch. App. 104. As to the general law on this subject, see title CONTRACT, Vol. VII., p. 357.

(*n*) *Dunnage* v. *White* (1818), 1 Swan. 137.

(*o*) *Johnson* v. *Medlicott* (1734), 3 P. Wms. 131, n. (a); *Cooke* v. *Clayworth* (1811), 18 Ves. 12. And generally, as to effect of the drunkenness of a party to a contract, see title CONTRACT, Vol. VII., p. 342.

(*p*) *Cory* v. *Cory* (1747), 1 Ves. Sen. 19.

SECT. 4. Parental and other Influence etc.

Ignorance.

1237. Ignorance of one party as to the true state of his rights is not a fatal defect in the arrangement, nor is ignorance of its true nature, so long as the transaction is in good faith and the ignorant party is not misled by any party thereto, and the ignorant party has an intention not widely different from that actually expressed by the arrangement (*q*). In such cases the knowledge of the solicitor or agent is the knowledge of the client or principal (*r*).

Non-disclosure.

1238. It is essential that the parties should be on an equal footing as regards information, and that during the negotiations the parties having the advantage of information should make full disclosure. If without any dishonest intention one party to the arrangement has material information in his possession which he does not communicate to the others, the transaction will be set aside on their application whether they did or did not make inquiries on the subject (*s*).

Misrepresentation.

1239. Misrepresentation will render the arrangement voidable, even if innocently made (*t*), whether by insufficient or erroneous explanation, or otherwise (*a*).

(*q*) *Dimsdale* v. *Dimsdale* (1856), 3 Drew. 556, 571; *Frank* v. *Frank* (1667), 1 Cas. in Ch. 84; *Stewart* v. *Stewart* (1839), 6 Cl. & Fin. 911, H. L.; *Lawton* v. *Campion* (1854), 18 Beav. 87. The decision in *Turner* v. *Turner* (1679), 2 Rep. Ch. 81 [154], was to the opposite effect, but the case is very imperfectly reported, and the grounds of the decision are not given. The headnote to *Gee* v. *Spencer* (1681), 1 Vern. 32, is inaccurate, and the decision appears to have gone on the fact that the relea sor had been led to believe something contrary to the fact, the case cited in support being one of fraud. The intention of the ignorant party may be shown by evidence, *e.g.*, of his desire to unite two estates which the arrangement settles in strict settlement (*Persse* v. *Persse* (1840), 7 Cl. & Fin. 279, H. L.).

(*r*) *Stewart* v. *Stewart*, *supra*, at p. 970.

(*s*) *Greenwood* v. *Greenwood* (1863), 2 De G. J. & Sm. 28, C. A.; *Leonard* v. *Leonard* (1812), 2 Ball & B. 171, 188. In *Pusey* v. *Desbouvrie* (1734), 3 P. Wms. 315, the executor kept to himself the value of the personal estate. So in *Cocking* v. *Pratt* (1750), 1 Ves. Sen. 400, *Groves* v. *Perkins* (1834), 6 Sim. 576, and *Greenwood* v. *Greenwood*, *supra*, some of the parties had more information as to the value of the property in question than the others. In *Bowles* v. *Stewart* (1803), 1 Sch. & Lef. 209, deeds were kept back. In *Gordon* v. *Gordon* (1821), 3 Swan. 400, the fact of a secret marriage was known to one party and not to the other. In *Harvey* v. *Cooke* (1827), 4 Russ. 34, the party complaining was not informed as to certain legal opinions that had been taken, and in *Smith* v. *Pincombe* (1852), 3 Mac. & G. 653, a will was not disclosed. In *Re Roberts*, *Roberts* v. *Roberts*, [1905] 1 Ch. 704, C. A., a legal opinion was incorrectly explained to the parties. See also *Dougan* v. *Macpherson*, [1902] A. C. 197, a case of a trustee purchasing from a *cestui que trust*, and title EQUITY, Vol. XIII., p. 24.

(*t*) This follows as a corollary from the preceding paragraph; see *Fane* v. *Fane* (1875), L. R. 20 Eq. 698; *Lansdown* v. *Lansdown* (1730), Mos. 364. This case was adversely criticised in *Stewart* v. *Stewart*, *supra*, at p. 964, but no doubt was thrown on the correctness of the decision so far as it decides that a positive misrepresentation, even as to legal rights, made by one of the parties to a family arrangement, is a ground for upsetting the arrangement at the suit of the party misled (*Gordon* v. *Gordon*, *supra*; *Re Roberts*, *Roberts* v. *Roberts*, *supra*); and see, generally, title MISREPRESENTATION AND FRAUD.

(*a*) *Harvey* v. *Cooke*, *supra*, and cases cited p. 543, *ante*.

SECT. 5.—*Separate Advice.*

SECT. 5. Separate Advice.

1240. It is not essential to the validity of a family arrangement that the various parties should have separate advice (*b*). Any party may be properly advised by the family solicitor (*c*), or even by another party having opposing interests (*d*). Separate advice.

It is, however, advisable to have separate advice, particularly if some of the parties have disadvantages of knowledge or are in an inferiority as regards education, means, or social position (*e*): to omit it is to incur risk (*f*).

The advice may be obtained either by employing a separate solicitor, or by the family solicitor instructing separate counsel to advise the party (*g*).

1241. The solicitor should take care that the state of and title to the property dealt with, and the rights therein of the party advised, are accurately represented (*h*). If the view of the solicitor be inaccurate as to facts or law, the arrangement may be voidable on the ground of non-disclosure or misrepresentation (*i*). It is not sufficient merely to read over the documents; the party must be made to understand their effect (*k*). Duties of solicitor in advising.

Any provision in the arrangement for the benefit of the solicitor or any other person in whom he is interested is difficult to support (*l*).

SECT. 6.—*Creditors' Rights.*

1242. A family arrangement is not void against creditors either under the statute 13 Eliz. c. 5 (*m*), or under the Bankruptcy Acts (*n*), if otherwise *bonâ fide;* but if made in such circumstances as to show that it was meant to defraud creditors, it will be set aside at their request (*o*). Creditors' rights.

A provision for the benefit of creditors in a family arrangement is subject to the rules usually applicable to such a provision (*p*).

(*b*) *Jenner* v. *Jenner* (1860), 2 Giff. 232, affirmed on appeal, 2 De G. F. & J. 359, 374; *Bentley* v. *Mackay* (1862), 4 De G. F. & J. 279, C. A.

(*c*) *Hoblyn* v. *Hoblyn* (1889), 41 Ch. D. 200.

(*d*) *Hotchkis* v. *Dickson* (1820), 2 Bli. 303, H. L.

(*e*) *Hoblyn* v. *Hoblyn, supra, per* KEKEWICH, J., at p. 205.

(*f*) *Sturge* v. *Sturge* (1849), 12 Beav. 229, 239. In such a case it will not be sufficient that the documents contain a full recital of the circumstances: the parties should also have time given them to consider their position and take the advice of their friends (*Evans* v. *Llewellin* (1787), 1 Cox, Eq. Cas. 333).

(*g*) *Hoblyn* v. *Hoblyn, supra.*

(*h*) *Fane* v. *Fane* (1875), L. R. 20 Eq. 698; *Hoblyn* v. *Hoblyn, supra; Willis* v. *Barron*, [1902] A. C. 271.

(*i*) *Re Roberts, Roberts* v. *Roberts*, [1905] 1 Ch. 704, C. A. As to duty of solicitors generally, see title SOLICITORS.

(*k*) *Sturge* v. *Sturge, supra.*

(*l*) *Willis* v. *Barron, supra;* and compare *Bellamy* v. *Sabine* (1847), 2 Ph. 425.

(*m*) *Jones* v. *Boulter* (1786), 1 Cox, Eq. Cas. 288; *Wakefield* v. *Gibbon* (1857), 1 Giff. 401; *Hotchkis* v. *Dickson, supra; Re Johnson, Golden* v. *Gillam* (1881), 20 Ch. D. 389; affirmed, 51 L. J. (CH.) 503, C. A.

(*n*) *Hance* v. *Harding* (1888), 20 Q. B. D. 732, C. A. (a settlement of property by a parent there forming a valuable consideration); and see *Re Eyre, Ex parte Eyre* (1881), 44 L. T. 922; and titles BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 275 *et seq.;* FRAUDULENT AND VOIDABLE CONVEYANCES.

(*o*) *Penhall* v. *Elwin* (1853), 1 Sm. & G. 258; *Re Maddever, Three Towns Banking Co.* v. *Maddever* (1884), 27 Ch. D. 523 C. A.

(*p*) *Priestley* v. *Ellis*, [1897] 1 Ch. 489.

SECT. 7. Actions to Set Aside or Vary.

SECT. 7.—*Actions to Set Aside or Vary.*

Actions to set aside or vary.

1243. The right to relief against the provisions of a family arrangement, and to set it aside or vary its terms, may be lost by acquiescence (*q*); delay for a long space of time (*r*); delay causing the remedy not to be mutual (*s*); the acquisition of rights by third parties, who will not be disturbed (*t*); or by any other means by which the *status quo ante* cannot be restored (*u*). The arrangement may sometimes not be set aside, although there are grounds of invalidity, if there are other grounds for supporting it (*v*), and a part of the arrangement may be upheld, while another part is invalidated (*w*).

Slight differences from the intention of the parties, contained in the document, are no ground for cancellation, but only for rectification (*a*). An obnoxious feature may also be removed by rectification, instead of cancellation (*b*).

Costs.

1244. No costs are usually given on either side if all parties have acted in good faith (*c*), or if there has been considerable delay in seeking the assistance of the court (*d*).

SECT. 8.—*The Effect of Family Arrangements on Powers conferred by the Settled Land Acts.*

Effect of family arrangements on tenant for life's powers.

1245. A family arrangement by which any estate or interest, giving to its owner the powers of a tenant for life under the Settled Land Acts (*e*), is charged or assigned, otherwise than as a security for payment of money advanced, does not affect the exercise of the powers vested in the tenant for life under the Settled Land Acts in respect of the original settlement creating the life estate (*f*).

(*q*) *E.g.*, by acts done on the supposition that the arrangement is valid (*Dimsdale* v. *Dimsdale* (1856), 3 Drew. 556; *Westby* v. *Westby* (1842), 2 Dr. & War. 502; see also *Smith* v. *Mogford* (1873), 21 W. R. 472); see also title EQUITY, Vol. XIII., pp. 166 *et seq.*

(*r*) *Head* v. *Godlee* (1859), John. 536; *Cood* v. *Cood* (1863), 33 Beav. 314.

(*s*) *Tweddell* v. *Tweddell* (1822), Turn. & R. 1.

(*t*) *Beckley* v. *Newland* (1723), 2 P. Wms. 182; *Re Worssam, Hemery* v. *Worssam* (1882), 51 L. J. (CH.) 669. But the validity against third parties may be without prejudice to the remedies against the parties to the document (*Willoughby* v. *Brideoake* (1865), 13 L. T. 141, C. A.).

(*u*) *Fowler* v. *Fowler* (1859), 4 De G. & J. 250, 274; see also title EQUITY, Vol. XIII., p. 169.

(*v*) *Lloyd* v. *Passingham* (1815), Coop. G. 152.

(*w*) *Dimsdale* v. *Dimsdale, supra.*

(*a*) *Hartopp* v. *Hartopp* (1856), 21 Beav. 259. In order to rectify a deed, however, it must be shown not only that the deed as drawn does not carry out the intention of the parties, but what that intention was.

(*b*) *Hoblyn* v. *Hoblyn* (1889), 41 Ch. D. 200, *per* KEKEWICH, J., at pp. 207, 213.

(*c*) *Stapilton* v. *Stapilton* (1739), 1 Atk. 2; and compare *Talbot* v. *Staniforth* (1861), 1 John. & H. 484.

(*d*) *Bullock* v. *Downes* (1860), 9 H. L. Cas. 1, 31.

(*e*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 2 (5), 58; see title SETTLEMENTS.

(*f*) Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 4, by which such charge or assignment is to be deemed one of the instruments creating the settlement, and not an instrument vesting in any person any right as assignee for value within the meaning or operation of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 50 (*Re Du Cane and Nettlefold's Contract*, [1898] 2 Ch. 96; *Re Wimborne*

SECT. 8. Effect of Family Arrangements etc.

Compound settlement.

1246. A family arrangement may be, and often is, one of the instruments creating a compound settlement under the Settled Land Acts (*g*).

(*Lord*) *and Browne's Contract*, [1904] 1 Ch. 537). It is difficult for a purchaser to take advantage of this provision; there is no definition of family arrangement for the purposes of the section, and the consent or concurrence of the chargee or assignee should as a rule be required; see *Re the Ailesbury Settled Estates*, [1893] W. N. 140. As to the effect of such an assignment as above on the payment of estate duties, see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., pp. 196, 198.

(*g*) As to compound settlements and the powers exercisable thereunder by virtue of the Settled Land Acts, see title SETTLEMENTS.

FATAL ACCIDENTS.

See CORONERS; EXPLOSIVES; NEGLIGENCE.

FEE SIMPLE AND FEE TAIL.

See DESCENT AND DISTRIBUTION; REAL PROPERTY AND CHATTELS REAL.

FEES.

See COPYHOLDS; COUNTY COURTS; COURTS; ECCLESIASTICAL LAW; EXECUTORS AND ADMINISTRATORS; HUSBAND AND WIFE; PRACTICE AND PROCEDURE; REGISTRATION OF BIRTHS, MARRIAGES AND DEATHS; SHERIFFS AND BAILIFFS.

FELO-DE-SE.

See CRIMINAL LAW AND PROCEDURE.

FELONY.

See CRIMINAL LAW AND PROCEDURE.

FENCES.

See BOUNDARIES, FENCES AND PARTY WALLS.

FERÆ NATURÆ.

See ANIMALS; FISHERIES; GAME.

FEROCIOUS ANIMALS.

See ANIMALS; NEGLIGENCE.

FERRIES.

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Part I.—Definition and Nature of a Ferry.

1247. A public ferry is a public highway of a special description (*a*), whose termini must be in places where the public have rights, such Definition.

(*a*) In *North and South Shields Ferry Co.* v. *Barker* (1848), 2 Exch. 136, PARKE, B., said, at p. 149, "a ferry is a highway for all the Queen's subjects paying toll." As to definition of a ferry, see also *Letton* v. *Goodden* (1866), L. R. 2 Eq. 123; *R.* v. *Cambrian Rail. Co.* (1871), L. R. 6 Q. B. 422, with which compare *Hopkins* v. *Great Northern Rail. Co.* (1877), 2 Q. B. D. 224, C. A.

PART I. Definition and Nature of a Ferry.

as towns or vills (*b*), or highways leading to towns or vills. In the one case, the grantee of the ferry has the exclusive right to carry passengers, animals, or goods over a river or an arm of the sea from town to town; in the other, he has a similar right to carry from one point to the other all who are going to use the highway to the nearest town or vill to which the highway leads on the other side (*c*).

Nature.

1248. A ferry exists in connection with the use of a right of way (*d*). There must be a line of way on land, coming to a landing-place on the water's edge, or, where the ferry is from or to a vill, from or to one or more landing-places in the vill (*e*); and so, it would seem, an exclusive right of ferry from one populous district (as distinguished from a town or vill) to another cannot be the subject of a valid Crown grant (*f*).

Independent of ownership of land.

1249. The right is wholly unconnected with the ownership or occupation of land (*g*), and it is not necessary that a ferry owner should have any property in the soil of the river over which he has a right of ferry (*h*). Nor, again, is it necessary that he should be the owner of the landing-places of the ferry, it being sufficient that they are in a public highway, or that otherwise he has a right to land upon them (*i*). The ferry owner does not occupy the highway over the river, but has merely a right to make a special use of it (*k*).

Unlawful claim to ferry.

An information in the nature of a *quo warranto* will lie against one who is alleged to claim unlawfully an exclusive right of ferry (*l*).

(*b*) As to the distinction between vills or towns or villages and mere districts, see Jacob's Law Dictionary, "vill"; Co. Litt. 115 b; *Cowes Urban Council* v. *Southampton, Isle of Wight, and South of England Royal Mail Steam Packet Co.*, [1905] 2 K. B. 287.

(*c*) *Huzzey* v. *Field* (1835), 2 Cr. M. & R. 432; *Newton* v. *Cubitt* (1862), 12 C. B. (N. S.) 32; affirmed (1863), 13 C. B. (N. S.) 864, Ex. Ch.; *Londonderry Bridge Commissioners* v. *M'Keever* (1891), 27 L. R. Ir. 464, 482, C. A. A right to a ferry involves a correlative obligation to keep up the ferry (*ibid.*). As to obstructing a navigable river, see *Jolliffe* v. *Wallasey Local Board* (1873), L. R. 9 C. P. 62; *A.-G.* v. *Terry* (1874), 9 Ch. App. 423, 425, n., and title WATERS AND WATERCOURSES.

(*d*) As to rights of way, generally, see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 284 *et seq.*

(*e*) *Newton* v. *Cubitt, supra.* In Jacob's Law Dictionary a ferry is stated to be a liberty by prescription of the King's grant to have a boat for passage upon a river for carriage of horses and men for reasonable tolls; see, also, *Webb's (Jehu) Case* (1608), 8 Co. Rep. 45 b, 46 b.

(*f*) See *Pim* v. *Curell* (1840), 6 M. & W. 234, 260; *Newton* v. *Cubitt, supra*; *Cowes Urban Council* v. *Southampton, Isle of Wight, and South of England Royal Mail Steam Packet Co., supra*, where it was suggested in argument that possibly it might be otherwise if the districts were so sparsely populated that more than one ferry could not be carried on at a profit. As to grants of franchises, see title CONSTITUTIONAL LAW, Vol. VI., p. 490.

(*g*) *Newton* v. *Cubitt, supra*; *Peter* v. *Kendal* (1827), 6 B. & C. 703.

(*h*) *Ipswich* (*Inhabitants*) v. *Browne* (1581), Sav. 11, Ex. Ch.

(*i*) *Peter* v. *Kendal, supra*, disapproving in this respect *Ipswich* (*Inhabitants*) v. *Browne, supra*, and Com. Dig. tit. Piscary (B).

(*k*) *R.* v. *Nicholson* (1810), 12 East, 330.

(*l*) *R.* v. *Reynell* (1742), 2 Stra. 1160; see title CROWN PRACTICE, Vol. X., p. 128.

But it has been questioned whether such an information would be granted on the application of a private person (*m*).

Part II.—Creation and Transfer of a Ferry.

SECT. 1.—*Creation.*

Creation.

1250. A ferry is created by royal grant, or in modern days by Act of Parliament (*n*), or exists by prescription, which implies a royal grant (*o*).

If there be already an existing ferry between two towns in the hands of any person the grant of another ferry between the same towns is void (*p*).

Terms of grant.

A grant of a ferry may be in more or less extensive terms (*q*). A grant of "all our ferriages and passages" over a certain river only applies to existing ferries, and does not confer on the grantee a right to create new ferries over the same river (*r*).

SECT. 2.—*Transfer.*

Conveyance of a ferry.

1251. A ferry being an incorporeal hereditament (*s*) lies in grant and not in livery. Hence its transfer is by deed (*t*). If the owner of the ferry owns also the soil of the landing-places they will be included in the conveyance, but such ownership of the soil is not necessary if there be a right to embark and disembark passengers and goods (*u*).

A right to a ferry may pass under a conveyance of land with its "profits and commodities" where the owners of the land have, with it, enjoyed the ferry as far as living memory goes (*w*).

(*m*) *R.* v. *Marsden* (1765), 3 Burr. 1812.

(*n*) *Letton* v. *Goodden* (1866), L. R. 2 Eq. 123; *Londonderry Bridge Commissioners* v. *M'Keever* (1891), 27 L. R. Ir. 464, C. A.

(*o*) See Hale, De Jure Maris, Part I., c. 2 (Hargrave, Law Tracts, p. 6), cited in *A.-G.* v. *Simpson*, [1901] 2 Ch. 671, 717, C. A., and *Simpson* v. *A.-G.*, [1904] A. C. 476, 490; and see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 267.

(*p*) *Pim* v. *Curell* (1840), 6 M. & W. 234, 268.

(*q*) *Matthews* v. *Peache* (1855), 5 E. & B. 546, 557; see also *Hemphill* v. *M'Kenna* (1845), 8 I. L. R. 43.

(*r*) *Londonderry Bridge Commissioners* v. *M'Keever*, *supra*.

(*s*) *Peter* v. *Kendal* (1827), 6 B. & C. 703.

(*t*) See title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 361. For form of conveyance, see Encyclopædia of Forms and Precedents, Vol. VI., p. 3. As to stamp duty (*ad valorem*), see Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 54 and Sched. I., "Conveyance or Transfer on Sale," and title REVENUE.

(*u*) *Peter* v. *Kendal*, *supra*; and see p. 556, *ante*. As a ferry is a continuation of a public highway it may perhaps be more correct to say that the right to use the landing-places is a right of the public, and not of the ferry owner; see Wellbeloved on Highways, pp. 35—37.

(*w*) *R.* v. *Great Northern Rail. Co.* (1849), 14 Q. B. 25; and consider now Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 6. The franchise of a ferry is included in "lands" within the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 3, and where it is held appurtenant to land, and is injuriously affected by the construction of authorised railway works, there may be a claim for compensation under that Act (*ibid.*). But where it is

SECT. 2. Transfer.

Lease of a ferry.

1252. As a ferry is an incorporeal hereditament, a lease of it must be by deed (*x*); and, as rent in the proper sense cannot at common law be reserved out of such an hereditament (*y*), there cannot be any distress in respect of it (*a*); but the amount reserved on a lease in such case may be recoverable, though not as rent, in an action for breach of contract (*b*).

A lease of a ferry, which exists only one way across a river, is good, though the lease describes the ferry as existing both ways (*c*).

Where a ferry is appurtenant to land it may pass under a lease of the land with its "profits and commodities" (*d*).

Part III.—Duties and Liabilities of Ferry Owner.

SECT. 1.—*Duties.*

Duties of ferry owner.

1253. A ferry, being a monopoly, is not granted for the benefit of the ferry owner but for the benefit of the public, so that the public may be certain of finding the means of transit across the river (*e*). In return for the monopoly the ferry owner must give attendance at due times, keep a boat in proper order, and take but reasonable toll (*f*).

injuriously affected by the subsequent user of the railway after construction, compensation is not claimable (*Hopkins* v. *Great Northern Rail. Co.* (1877), 2 Q. B. D. 224, C. A.; overruling *R.* v. *Cambrian Rail. Co.* (1871), L. R. 6 Q. B. 422).

(*x*) *Bird* v. *Higginson* (1835), 2 Ad. & El. 696; affirmed (1837), 6 Ad. & El. 824, Ex. Ch.; *Mayfield* v. *Robinson* (1845), 7 Q. B. 486; *Peter* v. *Kendal* (1827), 6 B. & C. 703. In this last case no point as to the insufficiency of a parol lease was raised at the trial, the plaintiff relying upon a subsequent surrender of the lease. See also *Anguish* v. *Ebden* (1830), cited in Gunning on Tolls, p. 111, where in an action for tolls a nonsuit was applied for, on the ground that the plaintiff had leased the tolls for a number of years. The nonsuit was refused as, the lease not being under seal, no interest in law passed under it. Compare *R.* v. *Fladbury* (*Inhabitants*) (1841), 10 Ad. & El. 706 (poor law settlement case).

(*y*) Co. Litt. 47 a, 142 a. Such a rent may be reserved by the Crown, or, by statute, by a subject (*Re Gerard* (*Lord*) *and Beecham's Contract*, [1894] 3 Ch. 295, C. A., *per* DAVEY, L.J., at p. 315).

(*a*) *Gardiner* v. *Williamson* (1831), 2 B. & Ad. 336 (a case of tithes); and see title DISTRESS, Vol. XI., p. 122.

(*b*) Co. Litt. 47 a; and see *North Eastern Railway* v. *Hastings* (*Lord*), [1900] A. C. 260; *A.-G.* v. *Emerson*, [1891] A. C. 649, 659.

(*c*) *Pim* v. *Curell* (1840), 6 M. & W. 234.

(*d*) *R.* v. *Great Northern Rail. Co.* (1849), 14 Q. B. 25. For form of lease, see Encyclopædia of Forms and Precedents, Vol. VI., p. 8. As to stamp duty on lease (*ad valorem*), see Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 75, and Sched. I., "Lease or Tack" and title REVENUE.

(*e*) *Dibden* v. *Skirrow*, [1907] 1 Ch. 437, *per* NEVILLE, J., at p. 444; affirmed, [1908] 1 Ch. 41, C. A.

(*f*) Hale, De Jure Maris, Part I., c. 2 (Hargrave, Law Tracts, p. 6), cited in *A.-G.* v. *Simpson*, [1901] 2 Ch. 671, 717, 718, C. A., and *Simpson* v. *A.-G.*, [1904] A. C. 476, 490; 16 Vin. Abr. 26, tit. Nuisance, G, 4, and *Letton* v. *Goodden* (1866), L. R. 2 Eq. 123, *per* KINDERSLEY, V.-C., at p. 131. A ferryman whose ferry is in salt water has always been exempt from being pressed for a soldier or otherwise (*Ipswich* (*Inhabitants*) v. *Browne* (1581), Sav. 11, 14, Ex. Ch.; 13 Vin. Abr., p. 208, tit. Ferry 3; *Ex parte Fox* (1793), 5 Term Rep. 276.

SECT. 1. Duties.

If there is no obligation to give attendance or to keep up boats there is no monopoly of a ferry (*g*).

The owner cannot relieve himself of his duties as a ferry owner by building a bridge (*h*). Where a person is authorised by Act of Parliament to build and maintain a bridge and take toll from such of the public as pass over it, and from time to time, whilst the bridge is under repair, to keep a ferry and take the like toll, he cannot keep and maintain the ferry only and leave the bridge unrepaired (*i*).

Penalty for neglect.

1254. A ferry owner is liable to be indicted and fined if he does not keep his ferry in readiness and in good repair (*k*), or to an action at the suit of a person who has suffered special damage by neglect of the ferry owner's duties (*l*).

Another consequence of such neglect may be that the Crown may by proceedings in the nature of *scire facias* or *quo warranto* annul the grant of the ferry, and if necessary vest it in some other person (*m*). But neglect does not *ipso facto* destroy the franchise of a ferry (*n*).

SECT. 2.—*Liabilities.*

Liability in respect of goods carrie

1255. The liability of a ferry owner in respect of goods carried by him is similar to that of a common carrier (*o*).

It is a question of fact whether a ferry owner himself undertakes to land goods as well as to carry them across a river, and, if a contract to land is established, there will be a further question as to what amounts to a landing, and whether a slip provided for it is sufficient and suitable (*p*). A contract to put on board or land animals or goods cannot be implied from the mere fact that the boat is a ferry boat (*p*).

Provision of safe landing-place.

The ferry owner must provide a safe landing-place, and where by reason of his failure to do so loss or damage is caused to goods or animals he is liable therefor (*q*). The ferry owner cannot

(*g*) *Londonderry Bridge Commissioners* v. *M'Keever* (1891), 27 L. R. Ir. 464, C. A.

(*h*) *Paine* v. *Partrich* (1691), Carth. 191.

(*i*) *Nicholl* v. *Allen* (1862), 1 B. & S. 916, 934, Ex. Ch.

(*k*) *Nedeport* (*Prior*) v. *Weston* (1443), Y. B. 22 Hen. 6, fo. 14 (23); 2 Roll. Abr., p. 140, tit. Nuisance, G, 4; Com. Dig. tit. Piscary, B, but see *Churchman* v. *Tunstal* (1660), Hard. 162; Hale, De Jure Maris, Part I., c. 2 (Hargrave, Law Tracts, p. 6), cited in *A.-G.* v. *Simpson*, [1901] 2 Ch. 671, 717, 718, C. A., and *Simpson* v. *A.-G.*, [1904] A. C. 476, 490; *Paine* v. *Partrich*, *supra*; *Pim* v. *Curell* (1840), 6 M. & W. 234.

(*l*) *Paine* v. *Partrich*, *supra*; see also *Blissett* v. *Hart* (1774), Willes, 508. The extortion of toll from an inhabitant of a town entitled to be carried toll-free would be special damage sufficient for an action (*ibid.*). For the liability to special damage for charging an unreasonable toll, see note (*a*), p. 560, *post*.

(*m*) *Peter* v. *Kendal* (1827), 6 B. & C. 703.

(*n*) *Ibid.*

(*o*) *Southcote's Case* (1601), 4 Co. Rep. 83 b; *Barcroft's Case* (undated), referred to in *Kenrig* v. *Eggleston* (1648), Aleyn, 93. See also titles CARRIERS, Vol. IV., pp. 2 *et seq.*; RAILWAYS AND CANALS; SHIPPING AND NAVIGATION.

(*p*) *Walker* v. *Jackson* (1842), 10 M. & W. 161.

(*q*) *Willoughby* v. *Horridge* (1852), 12 C. B. 742 (mare in charge of owner injured by defective side-rail of landing slip).

SECT. 2. Liabilities.

relieve himself from liability for such loss or damage by a notice not brought home to the owner of such goods or animals (*r*).

Risks of navigation.

If a ferry owner, though his boat is run for the convenience of the public, ventures to cross the water in a dense fog, where other traffic may be in his course, he takes upon himself the responsibility for injury to life or property which such a proceeding involves (*s*).

Part IV.—Rights of Ferry Owner and Remedies for Disturbance.

SECT. 1.—*Right to Tolls*

Right to tolls.

1256. As incident to the franchise of a ferry, the ferry owner has the right to demand and receive tolls, the amount of which need not, and generally does not, appear in the instrument granting the ferry, but must be reasonable (*t*). What is reasonable toll appears to be a question for the court (*u*). Where a right to tolls is granted, without the amount being fixed, the grantee may demand such amount as appears to him to be reasonable (*a*). The demand of an unreasonable toll would expose him to proceedings at the instance of a private individual forced to pay it, or of the Crown (*a*). Long usage and acquiescence in payment of a toll are *primâ facie* evidence of its reasonableness (*b*).

Effect of variation of tolls.

A variation in the toll does not destroy the franchise of a ferry. Indeed, a single variation may be evidence of the right of the person who demands it, as presumably without such right he would not have raised the toll, but repeated variations are evidence of usurpation (*c*).

A ferry owner may be obliged by custom to carry the inhabitants

(*r*) *Walker* v. *Jackson* (1842), 10 M. & W. 161.

(*s*) *The Lancashire* (1874), L. R. 4 A. & E. 198.

(*t*) Hale, De Jure Maris, Part I., c. 2 (Hargrave, Law Tracts, p. 6), cited in *A.-G.* v. *Simpson*, [1901] 2 Ch. 671, 717, 718, C. A.; and *Simpson* v. *A.-G.*, [1904] A. C. 476, 490. Though servants of the Crown, *e.g.*, postmen, may use a legal ferry, properly so called, free of toll, this exemption does not apply in the case of a ferry which a corporation is empowered by statute to establish, but is under no obligation to maintain or continue (*A.-G.* v. *Londonderry Bridge Commissioners*, [1903] 1 I. R. 389).

(*u*) 2 Co. Inst. 222; *Gard* v. *Callard* (1817), 6 M. & S. 69 (mill).

(*a*) *Stamford Corporation* v. *Pawlett* (1830), 1 Cr. & J. 57; affirmed (1831), 1 Cr. & J. 400, Ex. Ch. (fair or market). *Semble*, the payment of an extortionate sum would be sufficient special damage to entitle the individual paying it to maintain an action against the toll owner (*Paine* v. *Partrich* (1691), Carth. 191 (payment by one of the inhabitants of a vill discharged of toll by custom)).

(*b*) *Gard* v. *Callard*, *supra*.

(*c*) *Trotter* v. *Harris* (1828), 2 Y. & J. 285. See also *Peter* v. *Kendal* (1827), 6 B. & C. 703, where, in an action by a ferry owner for disturbance of ferry, it was held unnecessary to allege or prove a fixed sum for toll. As to a lease of tolls, see *Anguish* v. *Ebden* (1830), cited in Gunning on Tolls, p. 111; and see Encyclopædia of Forms and Precedents, Vol. VI., pp. 7, 9; and see further, as to tolls, titles HIGHWAYS, STREETS, AND BRIDGES; MARKETS AND FAIRS.

of a town free (*d*), and an action lies at the instance of any such inhabitant forced to pay toll contrary to the custom (*e*).

SECT. 2.—*Remedies for Disturbance.*

What is a disturbance.

1257. It is a disturbance of the rights of a ferry owner for another person to set up a ferry so near to his that his profits are diminished (*f*). But the ferry owner's rights are commensurate with his obligations, and, as he is obliged to carry across water by ferry only, it is no disturbance of his rights if another erects a bridge, and so diminishes or destroys the ferry owner's profits (*g*); and it seems that the ferry owner cannot maintain an action for disturbance if the traffic carried by the person of whose acts he complains is wholly new traffic which is different from that carried by him (*h*).

A person may disturb a ferry though he charges no toll (*i*); and an employer may be liable for a disturbance of a ferry by his servant whom he has engaged to ply for hire in the river where the ferry is (*j*).

Remedy for disturbance

1258. The ferry owner's remedy for a disturbance of his rights is an action in the nature of an action on the case for nuisance, or, in a proper case, an injunction (*k*).

(*d*) *Paine* v. *Partrich* (1691), Carth. 191.

(*e*) *Ibid.*

(*f*) See *Nedeport* (*Prior*) v. *Weston* (1443), Y. B. 22 Hen. 6, fo. 14; 2 Roll. Abr., p. 140, pl. 4; translated 16 Vin. Abr. 26, tit. Nuisance, G, 4; Com. Dig. tit. Piscary, B; 3 Bl. Com. 219; *Blissett* v. *Hart* (1744), Willes, 508; *Huzzey* v. *Field* (1835), 2 Cr. M. & R. 432.

(*g*) *Hopkins* v. *Great Northern Rail. Co.* (1877), 2 Q. B. D. 224, C. A.; overruling *dictum* on this point in *R.* v. *Cambrian Rail. Co.* (1871), L. R. 6 Q. B. 422; *Dibden* v. *Skirrow*, [1907] 1 Ch. 439; affirmed, [1908] 1 Ch. 41, C. A. In *Hopkins* v. *Great Northern Rail. Co.*, *supra*, the plaintiff failed on another ground also, namely, that as the railway bridge had been built under the authority of an Act of Parliament, and the injury to the ferry was caused, not by its construction, but by its subsequent working, the ferry had not been injuriously affected within the meaning of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 68, or the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 6. However, it is clear that an incorporeal hereditament, such as the franchise of a ferry, is "land" within the meaning of ss. 3 and 68 of the former Act: *Great Western Rail. Co.* v. *Swindon and Cheltenham Rail. Co.* (1884), 9 App. Cas. 787, 802. See title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 15.

(*h*) *Cowes Urban Council* v. *Southampton, Isle of Wight, and South of England Royal Mail Steam Packet Co.*, [1905] 2 K. B. 287.

(*i*) *Leamy* v. *Waterford and Limerick Rail. Co.* (1856), 7 I. C. L. R. 27.

(*j*) *Huzzey* v. *Field*, *supra*.

(*k*) See the authorities cited in note (*f*), *supra*. See also *Churchman* v. *Tunstal* (1660), Hard. 162, where the court at first dismissed the ferry owner's bill to suppress a new ferry, as seeking to establish a monopoly, but in 1662 the same court decreed that the new ferry should be suppressed; see, as to this, 2 Anst. at p. 608; *Huzzey* v. *Field*, *supra*, at p. 440. As to injunction see also *Cory* v. *Yarmouth and Norwich Rail. Co.* (1844), 3 Hare, 593; *Anon.* (1750), 1 Ves. Sen. 476 (application for injunction before defendant's answer refused); *Letton* v. *Goodden* (1866), L. R. 2 Eq. 123 (injunction refused, plaintiff being under no obligation to keep up ferry). See also *Cowes Urban Council* v. *Southampton, Isle of Wight, and South of England Royal Mail Steam Packet Co.*, *supra*, where an injunction and damages were claimed. As to injunction generally, see title INJUNCTION.

SECT. 2. Remedies for Disturbance.

Where a ferry owner is not bound to keep and maintain the ferry ready at all seasonable times for the benefit of the public, the reason for the monopoly ceases, and he will not be entitled to the assistance of the court in an action for disturbance (*l*).

Where there is a general right of ferry the imposition by Act of Parliament of a penalty in the case of boats of a certain tonnage disturbing the ferry does not limit the general right, but merely adds a cumulative remedy as regards such boats (*m*).

Nature of proof of rights required.

1259. It is sufficient for a ferry owner in an action for disturbance of his ferry to prove that he was in possession at the time of action brought (*n*). If such possession has been for a long period, neither a legal origin of the franchise of the ferry (*n*), nor proof of payment of a fixed sum for ferriage, need be proved (*o*), nor is it necessary to prove that sufficient men and boats were kept ready for the carriage of passengers or goods (*p*), or that the ferry owner owns the soil of the landing-places, if he has the use of them (*q*), or that the defendant in setting up a rival ferry intended to defraud the ferry owner (*r*).

Where a right of ferry both ways is claimed, but proved in respect of one way only, the ferry owner may have judgment in respect of that way (*s*).

Evidence.

1260. In cases involving a public right in which all the King's subjects are concerned, such as the right to a ferry, a verdict and final judgment *inter alios*, where proofs were given on both sides, and where the proceedings were not collusive, may be given in evidence (*t*). But if in the proceedings *inter alios* the court merely made an interlocutory order, reserving final judgment for a future time, such interlocutory order is not evidence (*a*).

Defences to action for disturbance.

1261. Neglect of duty is no answer to an action for disturbance of a ferry (*b*). But a defendant in such action may show that his ferry was set up to accommodate a new and different kind of traffic (*c*), or that there has been a change of circumstances creating new highways on land which would carry with it a right to continue

(*l*) 3 Bl. Com. 219; *Letton* v. *Goodden* (1866), L. R. 2 Eq. 123; *Londonderry Bridge Commissioners* v. *M'Keever* (1891), 27 L. R. Ir. 464, C. A.

(*m*) *North and South Shields Ferry Co.* v. *Barker* (1848), 2 Exch. 136.

(*n*) *Peter* v. *Kendal* (1827), 6 B. & C. 703; *Trotter* v. *Harris* (1828), 2 Y. & J. 285. In the latter case a user of thirty-five years was held sufficient.

(*o*) *Trotter* v. *Harris, supra.*

(*p*) *Blissett* v. *Hart* (1744), Willes, 508.

(*q*) *Peter* v. *Kendal supra;* not following on this point *Ipswich* (*Inhabitants*) v. *Browne* (1581), Sav. 11, 14, Ex. Ch.; and Com. Dig., tit. Piscary, B.

(*r*) *Blacketer* v. *Gillett* (1850), 9 C. B. 26.

(*s*) *Giles* v. *Groves* (1848), 12 Q. B. 721.

(*t*) *Neill* v. *Devonshire* (*Duke*) (1882), 8 App. Cas. 135, 147, 186; see also *Hemphill* v. *M'Kenna* (1845), 8 I. L. R. 43.

(*a*) *Pim* v. *Curell* (1840), 6 M. & W. 234; *Neill* v. *Devonshire* (*Duke*), *supra.* And see, generally, title EVIDENCE, Vol. XIII., pp. 544 *et seq.*

(*b*) *Peter* v. *Kendal, supra.*

(*c*) *Cowes Urban Council* v. *Southampton, Isle of Wight, and South of England Royal Mail Steam Packet Co.*, [1905] 2 K. B. 287; see *Dixon* v. *Curwen*, [1877] W. N. 4 (ferry on inland lake).

these across the water (*d*); or that the public cannot be served by the old ferry (*d*); or that he carries his traffic to a vill different from that to which the ferry owner carries his (*e*).

SECT. 2. Remedies for Disturbance.

Part V.—Extinguishment or Relinquishment of a Ferry.

Extinguishment.

1262. In early times a ferry might be extinguished or relinquished by a writ *ad quod damnum* and an inquisition thereon, followed by a licence from the Crown (*f*).

The procedure by the above writ has, however, in modern days fallen into disuse, and a ferry is now generally extinguished or relinquished by an Act of Parliament (*g*).

Part VI.—Rating of a Ferry.

Tolls not rateable.

1263. In general, rates are payable by the inhabitants of a parish and the occupiers of land, houses, and certain other property within it (*h*). There is no statute which specifically makes the tolls of a ferry rateable, and it is clear that such tolls, detached altogether from local real property, are not rateable (*i*). Nor does the occupation by the ferry owner of the landing-places make such tolls rateable (*k*).

(*d*) *Newton* v. *Cubitt* (1862), 12 C. B. (N. S.) 32; affirmed (1863), 13 C. B. (N. S.) 864, Ex. Ch.; *Hopkins* v. *Great Northern Rail. Co.* (1877), 2 Q. B. D. 224, 232, C. A.

(*e*) *Tripp* v. *Frank* (1792), 4 Term Rep. 666. See also *Matthews* v. *Peache* (1855), 5 E. & B. 546.

(*f*) *Paine* v. *Partrich* (1691), Carth. 191; 1 Hawk. P. C., c. 76, s. 3; *R.* v. *Montague* (1825), 4 B. & C. 598. As to annulling the grant of a ferry by proceedings in the nature of *scire facias* or *quo warranto*, see *Peter* v. *Kendal* (1827), 6 B. & C. 703, and p. 559, *ante*, and title CROWN PRACTICE, Vol. X., pp. 35, 128.

(*g*) *R.* v. *Montague*, *supra*; *Royal* v. *Yaxley* (1872), 36 J. P. 680 (where a ferry owner procured an Act of Parliament giving him leave to substitute a bridge for the ferry); see also *North and South Shields Ferry Co.* v. *Barker* (1848), 2 Exch. 136, where by the Act on the purchase of an ancient ferry and the completion of a new one the former became extinct. In *Peter* v. *Kendal*, *supra*, the interest of the lessee of a ferry was held to be surrendered on his becoming the servant of the ferry owner and working the ferry at certain wages.

(*h*) Poor Relief Act, 1601 (43 Eliz. c. 2); see title RATES AND RATING.

(*i*) *R.* v. *Nicholson* (1810), 12 East, 330.

(*k*) *R.* v. *North and South Shields Ferry Co.* (1852), 1 E. & B. 140. If they were rateable they would be so, either on the ground that by reason of their connection with the landing-places occupied by the ferry owner they cease to be incorporeal and become landed property, or on the ground that they can be indirectly rated by the rate being put on the landing-places as land enhanced in value by the net profit of the tolls (*ibid.*). As to the former of these grounds, though tolls appurtenant to land are rateable as land, yet tolls of a ferry cannot properly be said to be appurtenant or accessory to the landing-places, but the landing-places are accessory to the incorporeal franchise of

PART VI. Rating of a Ferry.

Rating of landing-places.

As regards the rating of the landing-places themselves, though the profits of the ferry cannot be properly brought into calculation as the profits of the landing places, yet the existence of the tolls cannot be wholly excluded, and the value should be taken, not as the value of the land merely, but as the value of the land as enhanced by being available for the purpose of earning the tolls (*l*).

Part VII.—Merchant Shipping Act, 1894, and Ferries.

Ferry boats subject to Merchant Shipping Act, 1894.

1264. Such ferry boats as fall within the definition of vessel or ship in the Acts relating to merchant shipping may, unless specially excluded, be subject to the provisions of these Acts (*m*). Thus, "vessel" includes any ship or boat, or any other description of vessel used in navigation, and "ship" includes every description of vessel used in navigation not propelled by oars (*n*).

Requirements as to registration.

1265. If a ferry boat is a British ship (*o*) it must, unless exempt from registry, be registered (*p*).

the ferry (*Re North and South Shields Ferry Co.* (1852), 1 E. & B. 140). Further, the ferry owner has no occupation of the highway over the river, but merely a right to make a special use of it (*R.* v. *Nicholson* (1810), 12 East, 330). See also *Williams* v. *Jones* (1810), 12 East, 346, where the fact that a post, to which the boats were sometimes made fast, was fixed in the landing-place, was held to be immaterial. The case of a canal company or a railway company is different, for they occupy local visible property in the parishes through which the canal or railway passes (*R.* v. *Nicholson, supra*). Again, the tolls cannot be indirectly rated by laying the rate on the landing-places and treating the net proceeds of the tolls as the direct profits earned by the use of the landing-places; for the tolls are not such profits, but arise mainly from the capital employed in the boats and their transit over the river (*R.* v. *North and South Shields Ferry Co., supra*).

(*l*) *R.* v. *North and South Shields Ferry Co., supra.* The court there refused to accede to the suggestion that a proportion of the profits might be assessed on the two landing-places according to the proportions which their dimensions bore to the length of the transit over the river. It has been suggested (see Castle, Law and Practice of Rating, 4th ed., p. 297) that the law applicable to the rating of ferries in general may not apply to ferries worked by ropes or chains lying on the bed of a river. Compare, as to lighthouses, *R.* v. *Tynemouth* (*Inhabitants*) (1810), 12 East, 46.

(*m*) See title SHIPPING AND NAVIGATION.

(*n*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 742. The word "includes" does not exclude other things, but rather enlarges the meaning. Thus a barge used for dredging, which was towed from one place to another, was under similar words in the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 2, held to be a ship, Lord COLERIDGE, C.J., saying that it was unnecessary that she should be used in navigation (*The Mac* (1882), 7 P. D. 38, 126, C. A.); compare *Southport Corporation* v. *Morriss*, [1893] 1 Q. B. 359 (launch used to convey passengers on pleasure trips round a lake half a mile long and 180 yards wide held not to be used in navigation, and so not a passenger steamer). A floating landing stage is not a vessel (*The Craighall*, [1910] P. 207, C. A.); and see title SHIPPING AND NAVIGATION.

(*o*) As to British ships, see Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 1.

(*p*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 2 (1). But ships not exceeding fifteen tons burden, employed solely in navigation on the rivers

Survey.

If it is a passenger steamer (*q*) carrying more than twelve passengers it must be surveyed once at least in each year, and must not ply, nor proceed to sea or on any voyage or excursion, with any passengers on board, unless the master or owner has the certificate of survey, and unless the same is in force, and applicable to the voyage or excursion on which the steamer is about to proceed (*r*).

or coasts of the United Kingdom, are exempt from registration (*ibid.*, s. 3 (1)). As to the meaning of fifteen tons burden, see *The Brunel*, [1900] P. 24, C. A.

(*q*) The provisions of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), applying to steamers or steamships, apply also to ships propelled by electricity or other mechanical power, with such modifications as the Board of Trade may prescribe for the purpose of adaptation (*ibid.*, s. 743). For the purposes of Part III. of that Act, which part deals with passenger and emigrant ships, the expression "passenger steamer" means every British steamship carrying passengers to, from, or between any places in the United Kingdom, except steam ferryboats working in chains (commonly called steam bridges), and every foreign steamship (whether originally proceeding from a port in the United Kingdom or from a port out of it), which carries passengers to or from any place, or between any places, in the United Kingdom (Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 267; as amended by Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 13). As to definition of "passenger" and mode of survey etc., see title SHIPPING AND NAVIGATION.

(*r*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 271.

FERTILISERS AND FEEDING STUFFS.

See AGRICULTURE.

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See AGENCY; COMPANIES; FRAUDULENT AND VOIDABLE CONVEYANCES; MISREPRESENTATION AND FRAUD; TRUSTS AND TRUSTEES.

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FIRE, INQUEST ON.

See CORONERS.

FIRE INSURANCE.

See INSURANCE.

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Part I.—Introductory.

Definition of fishery.

1266. In law the term "Fishery" means either an extent of land covered with water containing fish, or a right to take fish or a certain class of fish from a defined stretch of water. When used in the first sense it means that the ownership of the land covered with water and the right to the fish thereover are united as one corporeal inheritance, the right of fishing being a profit of the soil like the grass of other land (*a*), or that the ownership of the right to fish carries with it the ownership of the soil under the water, as in the case of a several fishery by fixed engines in tidal waters. Such a fishery is sometimes spoken of as a territorial fishery, and is hereafter referred to as a corporeal fishery (*b*). When used in the second sense the term implies nothing more than an incorporeal right—a right to take fish without interfering with the soil (*c*).

Distinct fisheries over the same land.

It is possible for a corporeal fishery and an incorporeal fishery to exist over the same extent of land; for instance, one may own the soil and the shell fishery thereover, and another may own the right of fishing for the floating fish (*d*), each having a fishery as a separate and distinct hereditament.

(*a*) *Marshall* v. *Ulleswater Steam Navigation Co.* (1863), 3 B. & S. 732; *Anon.* (1495), Y. B. 10 Hen. 7, fo. 24 B, pl. 1; 26 B, pl. 5; *Devonshire* (*Duke*) v. *Neill* (1877), 2 L. R. Ir. 132, 173.

(*b*) The expression "territorial fishery" is sometimes used to mean a fishery arising from ownership of the river bed, and sometimes to mean a fishery which belongs by presumption of law to riparian owners as distinguished from a fishery which is appurtenant to or parcel of a manor; see Woolrych, Law of Waters (1830 ed.), p. 87. Throughout this title the expression "corporeal fishery" is used to mean a corporeal inheritance—in tidal waters, a several fishery together with the soil thereunder; in non-tidal waters, the soil and a right of fishing thereover.

(*c*) *A.-G.* v. *Emerson*, [1891] A. C. 649, 656. Lord HALE, in distinguishing the different kinds of fishery in the sea, said: "Fishing may be of two kinds ordinarily, namely, the fishing with the net, which may be either as a liberty without the soil or as a liberty arising by reason of and in concomitance with the soil, or interest or propriety of it; or otherwise it is a local fishing that ariseth by and from the propriety of the soil. Such are *gurgites*, weares, fishing places, *borachiæ*, *stachiæ* etc., which are the very soil itself and so frequently agreed in our books" (Hale de Jure Maris, Part I., c. 5 (Hargrave, Law Tracts, p. 18)).

(*d*) *Seymour* v. *Courtenay* (*Lord*) (1771), 5 Burr. 2814; *Fitzwalter's* (*Lord*) *Case* (1674), 1 Mod. Rep. 105; *Rogers* v. *Allen* (1808), 1 Camp. 309; *Orford*

Also a man may own two separate fisheries over the same extent of land; for he may own the soil and the fishery thereover, and also the franchise fishery for royal fish, separate hereditaments which do not merge by the ownership of the soil (*e*).

Part II.—Public Fisheries.

SECT. 1.—*In Non-tidal Waters.*

No public right of fishery in non-tidal waters.

1267. The general public have not, of common right, a right to fish in waters that are not tidal (*f*), though they happen to be navigable (*g*). Of course, they may fish by leave of the owner of the fishery, or by his indulgence, carelessness, or good nature, but they have no right to fish as the public (*h*). They cannot acquire a right by prescription or otherwise, because a fluctuating and uncertain body like the public cannot in law prescribe for a *profit à prendre in alieno solo*, and, indeed, cannot be the grantee either of a several fishery or any other kind of real property (*i*).

SECT. 2.—*In Tidal Waters.*

SUB-SECT 1.—*Origin of Right.*

Public fishery in the sea.

1268. In the sea beyond the territorial waters (*k*) all subjects of this realm have by international law the right to fish in common with the rest of the world unless restrained by Act of Parliament (*l*).

Corporation v. *Richardson* (1791), 4 Term Rep. 437; reversed (1793) 5 Term Rep. 367, Ex. Ch.

(*e*) See p. 580, *post*. As to the Crown's right of fishing and to royal fish, see title CONSTITUTIONAL LAW, Vol. VII., p. 215; Vol. VI., p. 366.

(*f*) *Reece* v. *Miller* (1882), 8 Q. B. D. 626 (river Wye).

(*g*) *Smith* v. *Andrews*, [1891] 2 Ch. 678 (river Thames); *Blount* v. *Layard* (1888), cited [1891] 2 Ch. 681, n., C. A. (river Thames); *Murphy* v. *Ryan* (1868), 2 I. R. C. L. 143 (river Barrow); *Micklethwait* v. *Vincent* (1892), 67 L. T. 225 (Hickling Broad, Norfolk); *Mussett* v. *Burch* (1876), 35 L. T. 486 (river Stour, Suffolk, made navigable by Act of Parliament); *Hargreaves* v. *Diddams* (1875), L. R. 10 Q. B. 582 (river Itchen made navigable); *Pery* v. *Thornton* (1889), 23 L. R. Ir. 402 (Lough Conn, non-tidal navigable); *Bloomfield* v. *Johnston* (1868), 8 I. R. C. L. 68, Ex. Ch. (Lough Erne, non-tidal navigable); *Hudson* v. *Macrae* (1863), 4 B. & S. 585 (river Wandle, non-navigable).

(*h*) *Blount* v. *Layard* (1888), cited [1891] 2 Ch. 681, n., 690, n., C. A.

(*i*) *Smith* v. *Andrews*, *supra*; *Goodman* v. *Saltash Corporation* (1882), 7 App. Cas. 633, 648; *Neill* v. *Devonshire* (*Duke*) (1882), 8 App. Cas. 135, 154; and see *Hudson* v. *Macrae*, *supra*. As to *profits à prendre* generally, see title EASEMENTS AND PROFITS À PRENDRE, Vol. X., pp. 336 *et seq*. As to prescription, generally, see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 256 *et seq*.

(*k*) As defined by the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73), s. 7; *i.e.*, such part of the sea adjacent to the coast as is deemed by international law to be within the territorial sovereignty of His Majesty.

(*l*) See Oppenheim, International Law, Vol. I., p. 333, and authorities there quoted. By the Sea Fisheries Regulation (Scotland) Act, 1895 (58 & 59 Vict.

SECT. 2. In Tidal Waters.

The modes of fishing to be employed when fishing at sea are undefined, unless the particular locality is the subject of treaty, legislation (*m*), or special custom (*n*).

Public fishery in territorial tidal waters.

1269. In all waters within the territorial limits of the kingdom, subject to the flow and reflow of the tide, the public, being subjects of the realm, are entitled to fish (*o*), except where the King or some particular subject has gained a propriety exclusive of the public right (*p*), or Parliament has restricted the common law rights of the public (*q*). Originally the bed of the sea and of all tidal rivers and estuaries within the realm belonged to the Crown as part of the waste of the kingdom, and as owner of the soil the fishery was vested in the Crown, but by common law the public had a public common of fishery over such soil (*r*). The Crown, before Magna Charta (*s*), could exclude the right of the public to fish by granting a several fishery to a subject (*t*), and did so in numerous cases, but since that date this power has ceased to exist, and the public can now be deprived of their common right only by act of the legislature.

Limits of public fishery.

1270. As the public right of fishery is dependent on the presumed ownership of the soil by the Crown, the area in which the right may be exercised is limited to the Crown's right to the soil. It extends, therefore, only to the high-water mark of ordinary tides (*a*), and as far up rivers as the tide in the ordinary and regular course of things flows and reflows (*b*).

c. 42), s. 10, beam trawling and otter trawling may be prohibited to British subjects within thirteen miles of the Scottish coast.

(*m*) For special legislation with regard to extra-territorial waters, see pp. 621, 636, *post*.

(*n*) *Aberdeen Arctic Co.* v. *Sutter* (1862), 4 Macq. 355, H. L. (Greenland Whale Fishery); see p. 636, *post*.

(*o*) *Ward* v. *Creswell* (1741), Willes, 265.

(*p*) *Royal Fishery of Banne Case* (1610), Dav. Ir. 55; *Fitzwalter's* (*Lord*) *Case* (1674), 1 Mod. Rep. 105; *Neill* v. *Devonshire* (*Duke*) (1882), 8 App. Cas. 135.

(*q*) For instance, in the several oyster and mussel and cockle fisheries created by the Board of Trade under the powers of the Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), Part III., as amended by Sea Fisheries Act, 1884 (47 & 48 Vict. c. 27), s. 1.

(*r*) Hale de Jure Maris, Part I., c. 4 (Hargrave, Law Tracts, p. 10). See, further, title CONSTITUTIONAL LAW, Vol. VII., pp. 112, 215. For the effect on the right of the public of accretion and dereliction of the shore, see title WATERS AND WATERCOURSES.

(*s*) (1224–5) 9 Hen. 3.

(*t*) *Malcolmson* v. *O'Dea* (1863), 10 H. L. Cas. 593; *Murphy* v. *Ryan* (1868), 2 I. R. C. L. 143; *Carlisle Corporation* v. *Graham* (1869), L. R. 4 Exch. 361. There is a considerable weight of evidence to show that Magna Charta had no bearing on the right of the Crown to create several fisheries; see Moore, History and Law of Fisheries, ch. 2.

(*a*) *A.-G.* v. *Chambers* (1854), 4 De G. M. & G. 206; *Malcolmson* v. *O'Dea*, *supra*.

(*b*) *Reece* v. *Miller* (1882), 8 Q. B. D. 626; *Mussett* v. *Burch* (1876), 35 L. T. 486; *Murphy* v. *Ryan*, *supra*; *Calcraft* v. *Guest* (1897), cited in Moore, History and Law of Fisheries, p. 102 (reported on another point, [1898] 1 Q. B. 759, C. A.), where it was decided that flow and reflow means the vertical rise and fall of ordinary tides; and compare *Blower* v. *Ellis* (1886), 50 J. P. 326; *Micklethwait* v. *Vincent* (1892), 67 L. T. 225.

SUB-SECT. 2.—*Mode of Fishing by the Public.*

SECT. 2. IN TIDAL WATERS.

Mode of public fishing.

1271. The public right must be exercised reasonably and in accordance with the statute law (*c*). When fishing over soil which is not within the limits of a several fishery, but is in private ownership, the public must fish in the ordinary way. They may lay lines and draw their nets, but they must not set up stake nets or fixed engines (*d*). They may take shell fish but not shells, even though the shell fish have been placed there by some other fisherman; but they may not appropriate a part of the foreshore for the purpose of storing shell fish (*e*).

Public cannot acquire right of fishing in several fishery.

1272. Whatever mode of fishing is employed by the public, and however long continued, the public can acquire no right to fish in tidal waters which have once been the subject of a several fishery (*f*).

SUB-SECT 3.—*Right to use Shore and Banks for Fishing.*

No public right to use shores or banks.

1273. Apart from special custom of a particular locality (*g*), or statute law (*h*), the public have no right when fishing to go upon the land above high-water mark. They have the right of getting to and upon the water for the purpose of fishing by and from such places only as necessity and usage have appropriated to that purpose, but they have no general right of lading, unlading, or embarking upon the seashore or on the land adjoining thereto, except in case of peril or necessity (*i*). They must not draw their nets above the high-water mark (*k*); neither may they beach their boats there and leave them there for future use (*l*), nor land their nets and leave them drying above the high-water mark (*m*).

(*c*) *Whelan* v. *Hewson* (1871), 6 I. R. C. L. 283.

(*d*) *Bevins* v. *Bird* (1865), 12 L. T. 306.

(*e*) *Bagott* v. *Orr* (1801), 2 Bos. & P. 472; *Truro Corporation* v. *Rowe*, [1902] 2 K. B. 709, C. A.; but see judgment of FLETCHER MOULTON, L.J., in *Foster* v. *Warblington Urban Council*, [1906] 1 K. B. 648, 678 *et seq.*, C. A., that oysters placed in an oyster laying on a foreshore where there are no natural oysters are the property of the person who so placed them. See also title CONSTITUTIONAL LAW, Vol. VII., p. 215.

(*f*) *Neill* v. *Devonshire* (*Duke*) (1882), 8 App. Cas. 135.

(*g*) *Mercer* v. *Denne*, [1905] 2 Ch. 538, C. A., (custom of Kent); *Anon.* (1468), Y. B. 8 Edw. 4, fo. 18 B; Hale de Portibus Maris, Part II., c. 7 (Hargrave, Law Tracts, p. 86).

(*h*) In Somerset, Devon, and Cornwall there is a right to go upon land adjoining the coast for certain purposes connected with herring, pilchard, and seine fishing (stat. (1603) 1 Jac. 1, c. 23), and certain rights belong to herring fishers of landing fish and drying nets within 100 yards of the highest high-water mark in all parts of Great Britain (White Herring Fisheries Act, 1771 (11 Geo. 3, c. 31)).

(*i*) *Blundell* v. *Catterall* (1821), 5 B. & Ald. 268; compare *Brinckman* v. *Matley*, [1904] 2 Ch. 313, C. A.

(*k*) *Ipswich* (*Inhabitants*) v. *Browne* (1581), Sav. 11, 14, Ex. Ch.

(*l*) *Ward* v. *Creswell* (1741), Willes, 265; *Ilchester* (*Earl*) v. *Raishleigh* (1889), 61 L. T. 477; *Aiton* v. *Stephen* (1876), 1 App. Cas. 456.

(*m*) *Mercer* v. *Denne*, *supra*.

Part III.—Private Fisheries.

SECT. 1. Origin.

SECT. 1.—*Origin.*

SUB-SECT. 1.—*In Tidal Waters.*

Private fisheries in tidal waters.

1274. Private or several fisheries in tidal waters owe their origin to some act of the Crown before Magna Charta whereby the public right of fishing was excluded, and the fishery was either made exclusive for the Crown or for some subject (*n*). As fisheries of this class cannot now be created (*o*) except by act of the legislature, the public right of fishing, when it has existed since Magna Charta, cannot be now excluded under the Prescription Act or Statutes of Limitation (*p*). The Crown can grant the foreshore to a subject, but such grant will not carry with it a right to a several fishery over it. A grant of a several fishery before Magna Charta raises the presumption that the soil passed by the grant (*q*).

SUB-SECT. 2.—*In Non-tidal Flowing Waters.*

Private fisheries in non-tidal flowing waters.

1275. The right of fishing, being in its nature a profit of the soil and dependent upon and an incident of the ownership of the soil, was originally vested in the Crown as owner of the soil of the Kingdom (*r*). The Crown either granted out the fishery, as a separate hereditament, or with the adjoining manor as parcel thereof, or retained possession of it (*s*). The right of fishery after passing from the Crown has either remained parcel of the manor or has been alienated (1) with the riparian land or (2) as a separate hereditament. Owners of a fishery now must either be, or derive their right from, the owners of the soil (*a*).

SECT. 2.—*Different Kinds of Private Fisheries.*

Nature of several fisheries.

1276. A private right of fishing, whether in tidal or non-tidal waters, is either a right of several fishery or of common of fishery (*b*).

(*n*) *Royal Fishery of Banne Case* (1610), Dav. Ir. 55; *Neill* v. *Devonshire* (*Duke*) (1882), 8 App. Cas. 135 (Blackwater river, Ireland).

(*o*) *Malcolmson* v. *O'Dea* (1863), 10 H. L. Cas. 593; *A.-G.* v. *Burridge* (1822), 10 Price, 350.

(*p*) *James* v. *Hayward* (1630), W. Jo. 221; *Shuttleworth* v. *Le Fleming* (1865), 19 C. B. (N. S.) 687; *Ward* v. *Creswell* (1741), Willes, 265; *Dewell* v. *Sanders* (1618), Cro. Jac. 490; *Chasemore* v. *Richards* (1859), 7 H. L. Cas. 349; *Goodman* v. *Saltash Corporation* (1882), 7 App. Cas. 633, 648. As to prescription under the Prescription Act, see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 268, and as to Statutes of Limitation, see title LIMITATION OF ACTIONS.

(*q*) *A.-G.* v. *Emerson*, [1891] A. C. 649, 654; *Scratton* v. *Brown* (1825), 4 B. & C. 485.

(*r*) *Anon.* (1495), Y. B. 10 Hen. 7, fo. 24, B, pl. 1, 26 B, pl. 5; Chitty on Game Laws and Fisheries, p. 295; 2 Bl. Com. 39; *Marshall* v. *Ulleswater Steam Navigation Co.* (1863), 3 B. & S. 732; *Carlisle Corporation* v. *Graham* (1869), L. R. 4 Exch. 361.

(*s*) *Royal Fishery of Banne Case, supra*, where the Crown had granted out the riparian land and retained the fishery and soil of the river.

(*a*) *Hanbury* v. *Jenkins*, [1901] 2 Ch. 401; *Holford* v. *Bailey* (1849), 13 Q. B. 426, Ex. Ch.; *Carlisle Corporation* v. *Graham* (1869), L. R. 4 Exch. 361, *per* BRAMWELL, B., at p. 371.

(*b*) For common of fishery, see p. 579, *post*; and title COMMONS, Vol. IV.,

SECT. 2. Different Kinds of Private Fisheries.

A several fishery is an exclusive right of fishing in a given place, either with or without the property in the soil (*c*). By exclusive is meant that no other person has a co-extensive right with the owner (*d*). The fact that some other person has (1) a right to a particular class of fish in the fishery, (2) a right to fish in common with the owner of the several fishery, or (3) is entitled to fish at a certain time of the year under a presumed trust in his favour, does not destroy the severalty of the fishery (*e*).

Corporeal or incorporeal.

1277. Several fisheries may be corporeal or incorporeal, for the liberty of fishing being once in the subject he may part with the soil, reserving the fishery as an incorporeal hereditament (*f*).

Mode of alienation.

Several fisheries are held and pass in the same way as any other hereditaments. If corporeal they may pass by any mode of conveyance of corporeal property, but if incorporeal they can only pass by deed (*g*).

Tenure.

Several fisheries may be appurtenant to or parcel of a manor or appurtenant to a particular tenement, but not to a pasture (*h*), or in gross (*i*), and may be freehold, or copyhold, or leasehold (*k*).

SECT. 3.—*Presumptions of Law as to Ownership of Corporeal Fisheries.*

SUB-SECT. 1.—*In Non-tidal Rivers.*

Presumptions of ownership in non-tidal waters.

1278. There are three presumptions of law which, in the absence of definite evidence, may determine the ownership of a fishery or

pp. 459 *et seq.*, where the subject is fully treated. It has been stated that there is another kind of fishery, namely, a "free fishery," being either a fishery derived from the Crown at a place where *primâ facie* the public have a right of fishing or an unlimited common of fishery (see Oke, Fishery Laws, 3rd ed., p. 14; Woolrych, Law of Waters, p. 100); see, however, *Malcolmson* v. *O'Dea* (1863), 10 H. L. Cas. 593, deciding that a free fishery and a several fishery are the same thing. For instances of several fisheries in tidal waters and free fisheries in non-tidal waters, see Moore, History and Law of Fisheries, ch. 7.

(*c*) *Malcolmson* v. *O'Dea*, *supra*; *Hanbury* v. *Jenkins*, [1901] 2 Ch. 401, 411.

(*d*) *Seymour* v. *Courtenay* (*Lord*) (1771), 5 Burr. 2814.

(*e*) *Seymour* v. *Courtenay* (*Lord*), *supra* (oysters and fish for table); *Rogers* v. *Allen* (1808), 1 Camp. 309 (fishery for oysters); *Richardson* v. *Orford Corporation* (1793), 1 Anst. 231, Ex. Ch. (fishery for oysters); *Ecroyd* v. *Coulthard*, [1897] 2 Ch. 554; affirmed, [1898] 2 Ch. 358, C. A. (fishery for lampreys); *Tilbury* v. *Silva* (1890), 45 Ch. D. 98, C. A. (common of fishery); *Goodman* v. *Saltash Corporation* (1882), 7 App. Cas. 633 (trust in favour of a class of inhabitants).

(*f*) *Neill* v. *Devonshire* (*Duke*) (1882), 8 App. Cas. 135, 169; *Chesterfield* (*Lord*) v. *Harris*, [1908] 2 Ch. 397, 413, C. A.; *Little* v. *Wingfield* (1858), 8 I. C. L. R. 279. As to hereditaments, corporeal and incorporeal, see title REAL PROPERTY AND CHATTELS REAL.

(*g*) *Marshall* v. *Ulleswater Steam Navigation Co.* (1863), 3 B. & S. 732; *Bird* v. *Higginson* (1835), 2 Ad. & El. 696; and see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 361, and title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 246 *et seq.*

(*h*) *Hayes* v. *Bridges* (1795), Ridg. L. & S. 390; *Rogers* v. *Allen*, *supra*; *Carter* v. *Murcot* (1768), 4 Burr. 2162; *Edgar* v. *English Fisheries Special Commissioners* (1870), 23 L. T. 732.

(*i*) *Royal Fishery of Banne Case* (1610), Dav. Ir. 55. A fishery in gross cannot be claimed under the Prescription Act, 1832 (2 & 3 Will. 4, c. 71) (*Shuttleworth* v. *Le Fleming* (1865), 19 C. B. (N. S.) 687).

(*k*) *Tilbury* v. *Silva* (1890), 45 Ch. D. 98, C. A.; *A.-G.* v. *Emerson*, [1891] A. C. 649.

SECT. 3. **Presumptions of Law as to Corporeal Fisheries.**

throw the burden of proof on the party claiming against the presumption (*l*): (1) That the owner of land abutting upon a river is entitled to the soil and fishery in the river *usque ad medium filum aquæ* (*m*); (2) that the owner of the soil of a river is the owner of the fishery thereover (*n*); (3) that the owner of a several fishery is owner of the soil (*o*).

Riparian ownership presumption.

In the absence of any express reference to the soil and fishery, the riparian ownership presumption applies to all grants and leases of land whatever the tenure, described as bounded by a river, when made by a person who is in a position to part with the soil and fishery (*p*). This presumption may be rebutted entirely if it be shown that the surrounding circumstances in relation to the property in question at the time of the conveyance were such as to negative the possibility of there having been any intention to part with the fishery *ad medium filum aquæ* (*q*). But circumstances subsequent to and not contemplated at the time of the grant will not prevail against the presumption (*r*).

When displaced.

In case of a conflict between the owner of a several fishery and a riparian owner, the presumption that the owner of a several fishery is owner of the bed of the river displaces the presumption that would otherwise arise in favour of the riparian proprietor (*s*).

SUB-SECT. 2.—*In Tidal Waters.*

Presumption of ownership of fisheries in tidal waters.

1279. There are two presumptions as to fisheries in tidal waters: (1) That the soil subject to the ordinary flow and reflow of the tide belongs to the Crown, and the right of fishery thereover is common to all subjects of the realm (*t*); (2) that proof of ownership of a several fishery raises a presumption against the Crown that the soil under the fishery is in the owner of the fishery (*u*).

How rebutted.

1280. These presumptions are capable of rebuttal, for proof of ownership of a fishery is only evidence of title to the soil, the

(*l*) *Devonshire* (*Duke*) v. *Pattinson* (1887), 20 Q. B. D. 263, C. A.

(*m*) *Lamb* v. *Newbiggin* (1844), 1 Car. & Kir. 549; *Chesterfield* (*Lord*) v. *Harris*, [1908] 2 Ch. 397, C. A. For meaning of *medium filum aquæ*, see p. 583, *post*.

(*n*) Hale de Jure Maris, Part I., c. 1 (Hargrave, Law Tracts, p. 5); *Carlisle Corporation* v. *Graham* (1869), L. R. 4 Exch. 361, 371; *Hindson* v. *Ashby*, [1896] 2 Ch. 1, 9, C. A.; *Ecroyd* v. *Coulthard*, [1897] 2 Ch. 554, affirmed, [1898] 2 Ch. 358, 373, C. A.

(*o*) *Hanbury* v. *Jenkins*, [1901] 2 Ch. 401; *A.-G.* v. *Emerson*, [1891] A. C. 649; *Hindson* v. *Ashby*, *supra*; *Marshall* v. *Ulleswater Steam Navigation Co.* (1863), 3 B. & S. 732; *Somerset* (*Duke*) v. *Fogwell* (1826), 5 B. & C. 875; *Holford* v. *Bailey* (1849), 13 Q. B. 426, Ex. Ch., *per* PARKE, B., at p. 444. The omission of the word "several" in the description of the fishery in ancient documents does not affect this presumption (*Beaufort* (*Duke*) v. *Aird & Co.* (1904), 20 T. L. R. 602).

(*p*) *Micklethwait* v. *Newlay Bridge Co.* (1886), 33 Ch. D. 132, C. A. This presumption applies also to a riparian manor on its subinfeudation (see *Chesterfield* (*Lord*) v. *Harris*, [1908] 2 Ch. 397, C. A., *per* BUCKLEY, L.J., at p. 417).

(*q*) *Devonshire* (*Duke*) v. *Pattinson*, *supra*.

(*r*) *Micklethwait* v. *Newlay Bridge Co.*, *supra*.

(*s*) *Hindson* v. *Ashby*, *supra*.

(*t*) *Malcolmson* v *O'Dea* (1863), 10 H. L. Cas. 593; *A.-G.* v. *Chambers* (1854), 4 De G. M. & G. 206.

(*u*) *A.-G.* v. *Emerson*, *supra*; *Hanbury* v. *Jenkins*, *supra*; *Hindson* v. *Ashby*, *supra*.

SECT. 3. Presumptions of Law as to Corporeal Fisheries.

weight of which must depend upon the other circumstances of the case, and these may show it to be of little importance (*a*). In tidal waters there is no question of riparian ownership to mid-stream, because that is inconsistent with the presumption that the Crown never granted out the foreshore when it granted the riparian land, and the foreshore cannot therefore be presumed to have been parcel of the adjoining manor or land.

Moreover, owing to the restraining influence of Magna Charta on the power of the Crown to create several fisheries (*b*), there is no presumption that the owner of the soil is therefore owner of the fishery, and a grant of the soil *simpliciter* in tidal waters will not operate to pass the right of fishing thereover (*c*).

SECT. 4.—*Incorporeal Fisheries.*

SUB-SECT. 1.—*Several Fishery.*

Incorporeal fisheries.

1281. As fisheries owe their origin to ownership of the soil, whether in tidal or non-tidal waters, they were presumably at their creation by the Crown corporeal hereditaments (*d*). There is no legal restriction to their becoming incorporeal in their nature, for the liberty of fishing being once in the subject as an incident of the soil, he may grant out the soil, reserving the liberty as an incorporeal hereditament, or *vice versâ* (*e*). Where this has occurred the incorporeal fishery may be either a several fishery or a common of fishery, and it may be appurtenant to a manor or a house and land (*f*), but not to another incorporeal hereditament like a right of pasture (*g*), or it may be held in gross (*h*). An incorporeal fishery cannot be exercised by means of engines fixed in the soil unless there be a special provision in the grant, for the mere grant of such a fishery does not confer the right to occupy the soil, but the temporary driving in of stakes for holding a net in position may be regarded as ancillary to the grant (*i*). If the ownership of the soil and of the incorporeal fishery unites in the same person, the fishery merges in the soil and becomes a corporeal hereditament (*k*).

SUB-SECT. 2.—*Common of Fishery.*

Common of fishery.

1282. Common of fishery is a liberty of fishing in a several fishery in common with the owner of the fishery, and perhaps also

(*a*) *A.-G.* v. *Emerson*, [1891] A. C. 649, 655.
(*b*) See title CONSTITUTIONAL LAW, Vol. VI., p. 484, Vol. VII., p. 215; and p. 576, *ante*.
(*c*) *A.-G.* v. *Emerson*, *supra*, at p. 654; *Scratton* v. *Brown* (1825), 4 B. & C. 485, 503.
(*d*) See *A.-G.* v. *Emerson*, *supra*.
(*e*) *Neill* v. *Devonshire* (*Duke*) (1882), 8 App. Cas. 135, 169.
(*f*) *Hayes* v. *Bridges and Guess* (1795), Ridg. L. & S. 390.
(*g*) *Edgar* v. *English Fisheries Special Commissioners* (1870), 23 L. T. 732. See p. 577, *ante*.
(*h*) *Neill* v. *Devonshire* (*Duke*), *supra*, at p. 153; *Shuttleworth* v. *Le Fleming* (1865), 19 C. B. (N. S.) 687. See p. 577, *ante*.
(*i*) *A.-G.* v. *Emerson*, *supra*, at p. 656; Hale de Jure Maris, Part I., c. 5 (Hargrave, Law Tracts, pp. 18—20); and see p. 587, *post*.
(*k*) *Sury* v. *Pigot* (1626), Poph. 166.

SECT. 4. Incorporeal Fisheries.

with others who may be entitled to the same right (*l*). It may be held as either appurtenant to a house or land (but not to a pasture (*m*)), or in gross (*n*), and may be granted at this day (*o*). When not held in gross it may be claimed under the Prescription Act, 1832 (*p*)

SECT. 5.—*Franchise Fisheries—Royal Fish.*

Franchise fisheries.

1283. Although it has sometimes been suggested that a several fishery may be a franchise—a Royal privilege in the hands of a subject—part of the prerogative of the Crown (*q*), and that on forfeiture it would merge again in the Crown and could not be regranted, this is not the case (*r*). If a several fishery can be a franchise, which is doubtful, it must be an incorporeal fishery and of the same class of franchises as a warren (*s*), for the right of fishing did not grow originally out of the prerogative, but arose as a proprietary right from the ownership of the soil (*t*).

Right to royal fish.

1284. There is, however, a special right of fishery which is a franchise, namely, the right to the royal fish—whales and sturgeons. These fish are confirmed to the Crown by the Statute De Prerogativa Regis (*a*), whether taken in the sea or elsewhere in the realm, except in places where the Crown has granted out its rights (*b*). Except when taken by a grantee of the Crown, the captor has no property in the fish, though he be the owner of a several fishery at the spot where the fish is captured (*c*). When the fish are taken beyond the territorial waters of the realm they

(*l*) Woolrych, Law of Waters, p. 101; 2 Bl. Com. 34; *Bennett* v. *Costar* (1818), 8 Taunt. 183, *per* DALLAS, J., at p. 187; and see title COMMONS, Vol. IV., pp. 469 *et seq.*, where the subject is fully treated.

(*m*) *Edgar* v. *English Fisheries Special Commissioners* (1870), 23 L. T. 732; *Chesterfield* (*Lord*) v. *Harris*, [1908] 2 Ch. 397, C. A.

(*n*) See Woolrych, Law of Waters, p. 127. It is doubtful whether common of fishery can be appendant, as there is no recorded instance of its ever having been attached by law to the estates of any class of socage tenants in a manor; see Elton on Commons, p. 105; but see *Anon.* (1464), Y. B. 4 Edw. 4, 221 B, where a plea of common of fishery appendant to a house and lands was held to be good.

(*o*) *Solme* v. *Bullock* (1684), 3 Lev. 165.

(*p*) 2 & 3 Will. 4, c. 71; *Shuttleworth* v. *Le Fleming* (1865), 19 C. B. (N. S.) 687. See, also, title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 268.

(*q*) *Devonshire* (*Duke*) v. *Pattinson* (1887), 20 Q. B. D. 263, 271, C. A.; *Ecroyd* v. *Coulthard*, [1897] 2 Ch. 554, affirmed, [1898] 2 Ch. 358, 370, C. A.

(*r*) *Northumberland* (*Duke*) v. *Houghton* (1870), L. R. 5 Exch. 127; *Devonshire* (*Duke*) v. *Neill* (1877), 2 L. R. Ir. 132.

(*s*) *Northumberland* (*Duke*) v. *Houghton*, *supra*, *per* MARTIN, B., at p. 131.

(*t*) See p. 574, *ante*, and *Devonshire* (*Duke*) v. *Pattinson*, *supra*, *per* FRY, L.J., at p. 271.

(*a*) Stat. *temp. incert.* c. 13.

(*b*) *Ibid.* In some instances the grantees claimed the whale, saving to the King the head and tail; see title CONSTITUTIONAL LAW, Vol. VI., p. 366; Moore, History of the Foreshore, pp. 81, 82.

(*c*) 1 Bl. Com., 13th ed., 289; 1st ed., p. 290.

belong to the first taker, according to the rules and customs observed in the locality (*d*).

SECT. 6.—*Fisheries in Canals and Artificial Watercourses.*

Canals.

1285. In canals (including reservoirs and artificial watercourses) which are made over land, the right of fishing as an incident of the soil is *primâ facie* in the owner of the soil, and he may let or otherwise deal with it (*e*). If the canal be made under an Act of Parliament there may be special provisions as to the fishery (*f*). Where a river is canalised under an Act of Parliament, the right of fishery remains in the original owners unless the Act contains provisions to the contrary (*g*). In the case of canalised non-tidal rivers the public have no rights of fishery (*h*).

Artificial channels.

1286. When a channel is artificially made over or the sea suddenly breaks through the land of a private person, and tidal water is allowed to flow thereon, the public right of fishing will not follow the tide, because the public right is dependent on and limited to the soil owned by the Crown, and the right of fishing will belong to the owner of the soil of such channel (*i*).

SECT. 7.—*Fisheries in Ponds and Lakes.*

Ponds.

1287. The owner of land in which a pond is situate is presumed to be also the owner of the pond and all that is in it (*k*). The law as to the ownership of the soil and fishery in a pond is the same as the law relating to fisheries in non-tidal running water (*l*). Any man may construct on his own soil a fish pond or water wherein fish are kept and nourished (*m*), but he must not do so on a common if he thereby disturb the commoners' rights (*n*).

Lakes.

1288. The law as to the ownership of the soil and the right of fishing in large inland lakes is by no means certain. It has been decided that the Crown has no right *de jure* to the soil and fisheries of large inland non-tidal lakes, like its right to the foreshores of the

(*d*) *Aberdeen Arctic Co.* v. *Sutter* (1862), 4 Macq. 355, H. L.; see p. 636, *post*. In the absence of special custom an action of trespass will not lie for disturbance of fishing operations (*Young* v. *Hichens* (1844), Dav. & Mer. 592).

(*e*) Woolrych, Law of Waters, 1st ed., p. 45. As to canals generally, see title RAILWAYS AND CANALS.

(*f*) *Grand Union Canal Co.* v. *Ashby* (1861), 6 H. & N. 394; *Snape* v. *Dobbs* (1823), 8 Moore (C. P.), 23.

(*g*) *Hargreaves* v. *Diddams* (1875), L. R. 10 Q. B. 582.

(*h*) *I bid.*; *Mussett* v. *Burch* (1876), 35 L. T. 486.

(*i*) *Carlisle Corporation* v. *Graham* (1869), L. R. 4 Exch. 361; Hale de Jure Maris, Part I. (Hargrave, Law Tracts, pp. 9, 15, 19, 37).

(*k*) See Paterson, Fishery Laws, 2nd ed., p. 2; Woolrych, Law of Waters, 1st ed., p. 96; Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 24; Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 32; *Clarke* v. *Mercer* (1859), 1 F. & F. 492; *Greye's Case* (1594), Owen, 20.

(*l*) *Bristow* v. *Cormican* (1878), 3 App. Cas. 641, 666; see p. 577, *ante*.

(*m*) 2 Co. Inst. 199. As to his liability to prevent the water stored from escaping, see *Rylands* v. *Fletcher* (1868), L. R. 3 H. L. 330; 1 Smith, L. C., 11th ed. 810; *Nichols* v. *Marsland* (1875), L. R. 10 Exch. 255; affirmed (1876), 2 Ex. D. 1, C. A.; *Wilson* v. *Waddell* (1876), 2 App. Cas. 95; and title NUISANCE.

(*n*) *Reeve* v. *Digby* (1638), Cro. Car. 495.

SECT. 7. Fisheries in Ponds and Lakes.

kingdom (*o*). It has also been decided that the public have no common law right of fishing in navigable lakes (*p*). The question whether the presumption of riparian ownership to the *medium filum aquæ*, which pertains to non-tidal rivers, applies to land abutting upon a lake has not been definitely settled (*q*).

Apart from any question of riparian ownership, exclusive fisheries, both several and common, do exist in the large lakes of the kingdom, but the extent of such fisheries depends on the facts of each case (*r*).

SECT. 8.—*Fishing from Banks of Rivers and Canals.*

Right to fish from bank of river.

1289. The owner of a fishery has not of necessity any right to land or go along the neighbouring banks for the purpose of taking fish, because the right of fishery may be carried on by boats or other means without interfering with the adjacent shore (*s*).

Fishing path.

A right to a fishing path may be acquired by grant or prescription, and evidence of enjoyment for twenty years and upwards should be sufficient to warrant the judge directing a jury to presume a grant (*t*). Such a right may be prescribed for as appurtenant to a corporeal fishery and, *semble*, to an incorporeal fishery, because, though they be incorporeal rights, they so agree in nature and quality as to be capable of union without incongruity (*u*). The fact that a public highway abuts upon a river confers no right on anybody to fish therefrom, for no person except the owner of the soil has any right there except for the purpose of passage (*a*). The right, when exercisable over the wastes or copyholds of a manor, may be lost by the operation of an inclosure Act or by enfranchisement by the lord of the manor (*b*).

Towing path.

1290. The public have no right to fish from the towing path of a canal or other artificial watercourse: whether the owner of the

(*o*) *Bristow* v. *Cormican* (1878), 3 App. Cas. 641, 648. As to the right of the Crown to foreshore, see p. 574, *ante*.

(*p*) *Bloomfield* v. *Johnston* (1868), 8 I. R. C. L. 68, Ex. Ch.; *R.* v. *Burrow* (1869), 34 J. P. 53, where it was held that the point was not entirely settled, but the former case was not cited; *Pery* v. *Thornton* (1888), 23 L. R. Ir. 402; see *O'Neill* v. *Johnston*, [1909] 1 I. R. 237, C. A., where it was held that the public have no right to fish in an inland non-tidal lake.

(*q*) In *Bristow* v. *Cormican*, *supra*, Lord BLACKBURN, at p. 666, said he saw no reason why the law as to rivers and small lakes should not be the same, but doubted whether the presumption applied to a large lake like Lough Neagh. See also *Marshall* v. *Ulleswater Steam Navigation Co.* (1863), 3 B. & S. 732.

(*r*) In Ulleswater there is a corporeal several fishery (*Marshall* v. *Ulleswater Steam Navigation Co.*, *supra*. As to Coniston Water (fishery in gross), see *Shuttleworth* v. *Le Fleming* (1865), 19 C. B. (N. S.) 687. As to Whittlesea Mere (common of fishery), see Hundred Rolls, Vol. II., p. 646.

(*s*) Woolrych, Law of Waters, p. 133; *Ipswich* (*Inhabitants*) v. *Browne* (1581), Sav. 11, 14, Ex. Ch. *Sed quære*, when the fishery cannot be carried on except from the bank.

(*t*) *Gray* v. *Bond* (1821), 2 Brod. & Bing. 667; *R.* v. *Ellis* (1813), 1 M. & S. 652.

(*u*) *Hanbury* v. *Jenkins*, [1901] 2 Ch. 401, *per* BUCKLEY, J., at p. 422; but this is contrary to the view of Lord COKE; see Co. Litt. 121 b: see also *Shuttleworth* v. *Le Fleming*, *supra*; *Ball* v. *Herbert* (1789), 3 Term Rep. 253.

(*a*) *Harrison* v. *Rutland* (*Duke*), [1893] 1 Q. B. 142, C. A.

(*b*) *Ecroyd* v. *Coulthard*, [1897] 2 Ch. 554, affirmed, [1898] 2 Ch. 358, C. A.; *Tilbury* v. *Silva* (1890), 45 Ch. D. 98, C. A.

fishery in these waters may fish from the towing path will depend on the construction of the Act of Parliament under which they are made, or on the terms on which the soil under such waters was conveyed to the proprietors of such canal or watercourse (*c*).

SECT. 8. Fishing from Banks of Rivers and Canals.

SECT. 9.—*Boundaries of Fisheries.*

Boundaries of fisheries.

1291. The extent in length of a fishery, in the absence of evidence to the contrary, is determined in the case of a manorial fishery by the bounds of the manor, and in the case of a fishery owned by a riparian owner, in respect of his riparian land, by the extent of the land abutting on the river.

In non-tidal waters.

The general rule for ascertaining the width of a fishery in a non-tidal river is that it extends *usque ad medium filum aquæ* (as far as the middle thread of the water), but it frequently happens in fact that the fishery extends over the whole breadth of the river (*d*).

It has never been decided by the courts where exactly the *medium filum aquæ* is to be taken in the case of non-tidal rivers, but it has been decided what is the extent of the bed of a river, and consequently what is the width of a several fishery in a river (*e*). From this it seems to follow that the *medium filum aquæ*—the common law boundary between fisheries belonging to riparian owners—is a line running down the middle of the bed of the river, the bed being that portion of the soil of the river which is always covered with water and that portion which is alternately covered or left bare as there may be an increase or diminution in the supply of water, and which is adequate to contain the water at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring or the extreme droughts of the summer or autumn (*f*).

In tidal waters.

1292. In tidal waters, where a fishery is not limited to the foreshore but extends *usque ad medium filum aquæ*, the boundary will be halfway between the low-water marks of ordinary tides on either side of the river (*f*).

SECT. 10.—*Fishery Leases and Licences.*

Leases and tenancies of fisheries.

1293. The owner of a fishery may lease it as a corporeal hereditament with the soil, reserving a rent in the same way as other corporeal hereditaments are leased, or he may let only the incorporeal liberty of fishing either as to the whole of his fishery or for a limited class of fish or by certain modes of fishing (*g*). If

(*c*) See note (*f*), p. 581, *ante*, and cases there cited.

(*d*) Compare *Hindson* v. *Ashby*, [1896] 2 Ch. 1, C. A.; *Smith* v. *Andrews*, [1891] 2 Ch. 678; *Blount* v. *Layard* (1888), cited [1891] 2 Ch. 681, n., C. A.

(*e*) *Hindson* v. *Ashby*, *supra*.

(*f*) See Hale de Jure Maris, Part I., c. 6; Moore, History of the Foreshore, pp. 353, 403, 405; Moore, History and Law of Fisheries, pp. 117 *et seq.*; but see *Thames Conservators* v. *Smeed, Dean & Co.*, [1897] 2 Q. B. 334, C. A., overruling *Pearce* v. *Bunting, R.* v. *Wedd, Ex parte Pearce*, [1896] 2 Q. B. 360, where the term "bed of the Thames," in the Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), was held to be the soil between the high-water marks of ordinary tides on either side of the river.

(*g*) *Seymour* v. *Courtenay* (*Lord*) (1771), 5 Burr. 2814.

SECT. 10. Fishery Leases and Licences.

an incorporeal right only is let it must be by deed under seal (*h*). A fishery may be let by verbal agreement even without an agreed rent, and the landlord will be entitled to sue for a reasonable sum for use and occupation (*i*). When the owner of the fishery is also riparian owner, a lease by him of the riparian land presumptively carries with it the right of fishing in the river *ex adverso* the land *usque ad medium filum aquæ* (*j*), and to defeat this presumption it is necessary to reserve the right of fishing in the lease. Such reservation operates as a regrant to the lessor, his assigns and their servants, if the lease is executed by the lessee (*k*), and even if the lessee fails to execute he may still be bound to give effect to the reservation (*l*).

Licence to fish.

1294. Besides the power of leasing the owner may, by parol or by deed, license persons to fish. A licence by parol will not give the licensee a right to take away the fish caught, because a licence to take away fish is an interest in land within the Statute of Frauds (*m*), and must be by deed under seal (*n*). A parol licence merely renders the act of fishing lawful, and may be revoked at any time, but reasonable notice of such revocation must be given (*o*). If valuable consideration has been given an action for breach of contract is maintainable (*p*).

Effect of grant of fishery rights.

1295. A grant by deed of the right of fishing is not a mere licence to fish, but is a grant of the right to fish and carry away the fish caught, and the grantees have a right of action against anyone who wrongfully interferes with their right (*q*).

(*h*) *Somerset* (*Duke*) v. *Fogwell* (1826), 5 B. & C. 875 ; *Bird* v. *Higginson* (1835), 2 Ad. & El. 696; affirmed (1837), 6 Ad. & El. 824, Ex. Ch. If the fishing is done under an agreement not under seal, the court will restrain the landlord from interfering (*Frogley* v. *Lovelace* (*Earl*) (1859), John. 333. See, also, title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 361.

(*i*) *Holford* v. *Pritchard* (1849), 3 Exch. 793; Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 14,

(*j*) *Davies* v. *Jones* (1902), 18 T. L. R. 367; *Jones* v. *Davies* (1902), 86 L. T. 447; *Doe* d. *Freeland* v. *Burt* (1787), 1 Term Rep. 701.

(*k*) *Durham and Sunderland Rail. Co.* v. *Walker* (1842), 2 Q. B. 940, 967, Ex. Ch.; *Reynolds* v. *Moore*, [1898] 2 I. R. 641 ; *Wickham* v. *Hawker* (1840), 7 M. & W. 63; *Dynevor* (*Lord*) v. *Tennant* (1888), 13 App. Cas. 279.

(*l*) *May* v. *Belleville*, [1905] 2 Ch. 605 ; but see *Corcor* v. *Payne* (1870), 4 I. R. C. L. 380.

(*m*) 29 Car. 2, c. 3.

(*n*) *Webber* v. *Lee* (1882), 9 Q. B. D. 315, C. A.; Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 3. An incorporeal right of fishing was held to be not such an interest in land as to enable a lessee to claim compensation under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18); see *Bird* v. *Great Eastern Rail. Co.* (1865), 19 C. B. (N. S.) 268; *sed quære*, when the effect of making the railway would be to destroy the fishery entirely. For a form of acknowledgment of licence to fish, see Encyclopædia of Forms and Precedents, Vol. I., p. 197. As to licences to enter upon land, see title REAL PROPERTY AND CHATTELS REAL.

(*o*) *Mellor* v. *Watkins* (1874), L. R. 9 Q. B. 400. As to what may amount to reasonable notice, see *Lowe* v. *Adams*, [1901] 2 Ch. 598.

(*p*) *Kerrison* v. *Smith*, [1897] 2 Q. B. 445.

(*q*) *Fitzgerald* v. *Firbank*, [1897] 2 Ch. 96, C. A. For forms of leases and licences of fishery rights, see Encyclopædia of Forms and Precedents, Vol. VII., pp. 600 *et seq.*

A lessee of a fishery under a covenant not to sublet nor assign the demised premises is not prevented from granting a limited licence to another person to fish if the covenant does not restrict him from subletting part of the premises (*r*).

SECT. 11.—*Evidence of Title to Fisheries.*

SUB-SECT. 1.—*By Documentary Evidence* (*s*).

Grant and possession.

1296. Title to a fishery may be shown by production of the grant with possession thereunder or by proving possession for sufficient time to raise the presumption of a lost grant or to give a statutory title (*t*). In many cases the grant of the fishery is an ancient deed, and when a question arises as to what passes by the grant it can be explained by modern user (*u*). The words "fishery or several fishery" are sufficient to pass the right to a fishery (*v*); so, too, the word "weir," or something of that kind (*w*), and if the grantor had the soil under the fishery the soil will pass by such a grant, because the owner of a fishery, in the absence of evidence to the contrary, is presumed to be the owner of the soil (*a*). A grant of a several fishery with livery of seisin and a reservation of a quit rent is a grant of a corporeal hereditament (*b*).

Construction of Crown grants.

1297. When the grant is made by the Crown it is construed strictly against the grantee, and it passes nothing by implication (*c*), but a grant by the Crown of a definite stretch of a several fishery may still be a good grant of a several fishery in part of the river so included, though as to the other part the Crown had no several fishery to give (*d*).

Necessity of proving date of grant.

1298. In the case of non-tidal waters it is not necessary, though often very desirable, to trace the title to the fishery far back and to prove that it is an ancient one (*e*), but where the fishery is in tidal waters, if the grant is not forthcoming, it is imperative to show evidence of its existence before Magna Charta (*f*), or such evidence as will raise a presumption that it was in existence as a

(*r*) *Grove* v. *Portal*, [1902] 1 Ch. 727.

(*s*) As to documentary evidence in general, see title EVIDENCE.

(*t*) As to prescription under the doctrine of a lost grant, see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 264; and as to prescription generally, *ibid.*, p. 256.

(*u*) *Beaufort* (*Duke*) v. *Swansea Corporation* (1849), 3 Exch. 413; *Devonshire* (*Duke*) v. *Pattinson* (1887), 20 Q. B. D. 263, C. A.

(*v*) *London Alderman* v. *Hasting* (1657), 2 Sid. 8; *Throckmerton* v. *Tracy* (1555), Plowd. 145; *Malcolmson* v. *O'Dea* (1863), 10 H. L. Cas. 593; *Neill* v. *Devonshire* (*Duke*) (1882), 8 App. Cas. 135; *Hanbury* v. *Jenkins*, [1901] 2 Ch. 401.

(*w*) *Hanbury* v. *Jenkins*, *supra*.

(*a*) *A.-G.* v. *Emerson*, [1891] A. C. 649; *Hindson* v. *Ashby*, [1896] 2 Ch. 1, C. A.; *Partheriche* v. *Mason* (1774), 2 Chit. 658. See also p. 578, *ante*.

(*b*) *Marshall* v. *Ulleswater Steam Navigation Co.* (1863), 3 B. & S. 732.

(*c*) *Royal Fishery of Banne Case* (1610), Dav. Ir. 55.

(*d*) *Hanbury* v. *Jenkins*, *supra*.

(*e*) Compare *Chesterfield* (*Lord*) v. *Harris*, [1908] 2 Ch. 397, C. A.

(*f*) (1224-5) 9 Hen. 3; confirmed (1297) 25 Edw. 1, c. 1; *Goodtitle* d. *Parker* v. *Baldwin* (1809), 11 East, 488; and see title CONSTITUTIONAL LAW, Vol. VI., p. 484; Vol. VII., p. 215.

SECT. 11. Evidence of Title to Fisheries.

separate hereditament before that date. What amount of evidence is necessary to establish this must depend greatly on the particular facts of the case, but the evidence must be such as to establish that the fishery has been dealt with as of right, as a distinct and separate property, and that there is nothing to show that its origin is modern (*g*). Evidence of possession during living memory has been held sufficient to sustain a title founded on ancient documents (*h*), and when the fishery is granted out by a Crown patent and is followed by sufficient user, it is sufficient evidence that the fishery was created before Magna Charta (*i*).

SUB-SECT. 2.—*By User.*

Evidence of possession necessary.

1299. As a perfect documentary title is not sufficient to maintain an action against a trespasser or a person claiming an adverse right, when the title is in issue, it is necessary to give evidence of possession under the documentary title (*j*). What amount of possession is requisite must vary according to circumstances; what may demonstrate it in one case may be quite inadequate in another. The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests, are to be taken into account in determining the sufficiency of possession (*k*).

Acts of ownership over parts of the fishery.

1300. In proving possession it is not necessary to show acts of ownership over every part of the fishery, when it happens to be a connected and unbroken entity, for the owner of a fishery cannot be expected to prove proceedings indicative of his ownership of every part of the fishery, and, if he show exercise of dominion over certain parts in accordance with a claim of title to the whole, such evidence may be decisive as to his ownership of the whole fishery (*l*). If though the fishery be an unbroken entity, a *unum quid*, but the title to parts of it are distinct, acts of ownership in one part are not evidence of ownership of the whole (*m*).

What evidence of possession necessary.

1301. Ownership may be proved by old leases and counterpart leases. Evidence of payment of rent under such leases amounts to a clear and distinct evidence of possession (*n*). Demises by copy

(*g*) *Malcolmson* v. *O'Dea* (1863), 10 H. L. Cas. 593; *Edgar* v. *English Fisheries Special Commissioners* (1870), 23 L. T. 732.

(*h*) *Ashworth* v. *Browne* (1860), 10 I. Ch. R. 421.

(*i*) (1224-5) 9 Hen. 3; *Neill* v. *Devonshire* (*Duke*) (1882), 8 App. Cas. 135, 180; and see *O'Neill* v. *Allen* (1859), 9 I. C. L. R. 132; *Tighe* v. *Sinnott*, [1897] 1 I. R. 140.

(*j*) *Neill* v. *Devonshire* (*Duke*), *supra*, at p. 143; *Blount* v. *Layard* (1888), cited [1891] 2 Ch. 681, n., C. A.

(*k*) *Lord Advocate* v. *Lovat* (*Lord*) (1880), 5 App. Cas. 273, 288; *Neill* v. *Devonshire* (*Duke*), *supra*, at p. 165.

(*l*) *Jones* v. *Williams* (1837), 2 M. & W. 326; *Neill* v. *Devonshire* (*Duke*), *supra*; compare *Lord Advocate* v. *Young*, *North British Rail. Co.* v. *Young* (1887), 12 App. Cas. 544. As to evidence of title of fisheries and other franchises within a manor, see title COPYHOLDS, Vol. VIII., p. 7.

(*m*) *Neill* v. *Devonshire* (*Duke*), *supra*, at p. 151.

(*n*) *Bristow* v. *Cormican* (1878), 3 App. Cas. 641; *Neill* v. *Devonshire* (*Duke*)

of court roll (*o*), licences (*p*), and possessory suits are likewise evidence. Actions against trespassers, even though judgment went by default of pleading (*q*), convictions (*r*), and accounts of ministers, receivers, and stewards showing receipt of rent or profit from the fishery (*s*), and surveys (*t*), are admissible as evidence to prove possession.

Land tax assessment books may be evidence of ownership of a fishery (*a*). In the case of poor rate assessments before 1874, only fisheries with the soil were rateable (*b*). Many other documents may be proof of possession on the general principles of evidence as to possession (*c*). In the case of fisheries in tidal waters, evidence of reputation is admissible, because the public interest is involved (*d*).

Evidence of ownership of soil of fishery.

1302. Evidence of ownership of eyots and islands in a river raises a presumption of ownership of the soil of the river (*e*). Fishing by means of a weir or similar fixed engine is evidence of possession of some several fishery in or near those places (*f*). Weirs are evidence of ownership of a corporeal fishery (*g*), and a grant of weirs is a grant not only of a mere right of fishing, but of a corporeal hereditament consisting not only of the soil in which particular weirs are constructed, but of the soil over which the river flows and upon which there is a right to construct weirs for the purpose of taking fish (*h*), and such a grant may pass a continuous fishery (*i*).

(1882), 8 App. Cas. 135; *Musgrave* v. *Inclosure Commissioners* (1874), L. R. 9 Q. B. 162.

(*o*) *A.-G.* v. *Emerson*, [1891] A. C. 649.

(*p*) *Rogers* v. *Allen* (1808), 1 Camp. 309; *Neill* v. *Devonshire* (*Duke*) (1882), 8 App. Cas. 135, 162—167; *Mannall* v. *Fisher* (1859), 5 C. B. (N. S.) 856; *Mills* v. *Colchester Corporation* (1868), 37 L. J. (C. P.) 278, Ex. Ch.

(*q*) *Neill* v. *Devonshire* (*Duke*), *supra*; *Vooght* v. *Winch* (1819), 2 B. & Ald. 662; *Calcraft* v. *Guest*, [1898] 1 Q. B. 759, C. A.; *Malcolmson* v. *O'Dea* (1863), 10 H. L. Cas. 593.

(*r*) *Smith* v. *Andrews*, [1891] 2 Ch. 678.

(*s*) *A.-G.* v. *Emerson*, *supra*; *Exeter Corporation* v. *Warren* (1844), 5 Q. B. 773; *Percival* v. *Nanson* (1851), 7 Exch. 1; *Doe* d. *Strode* v. *Seaton* (1834), 2 Ad. & El. 171.

(*t*) *Edgar* v. *English Fisheries Special Commissioners* (1870), 23 L. T. 732.

(*a*) *Doe* d. *Strode* v. *Seaton*, *supra*; *Smith* v. *Andrews*, *supra*; *Palmer* v. *Andrews* (1902), cited in Moore, History and Law of Fisheries, p. 147; *Wilberforce* v. *Hearfield* (1877), 5 Ch. D. 709.

(*b*) Rating Act, 1874 (37 & 38 Vict. c. 54); see also *R.* v. *Ellis* (1813), 1 M. & S. 652; and title RATES AND RATING.

(*c*) See, generally, title EVIDENCE, Vol. XIII.

(*d*) *Neill* v. *Devonshire* (*Duke*), *supra*, at p. 186; *Calcraft* v. *Guest*; *supra*, where proofs of deceased witnesses were admitted.

(*e*) Hale de Jure Maris, Part I., c. 6 (Hargrave, Law Tracts, p. 36); see also *Great Torrington Commons Conservators* v. *Moore Stevens*, [1904] 1 Ch. 347.

(*f*) *Neill* v. *Devonshire* (*Duke*), *supra*, at p. 143; *Lord Advocate* v. *Lovat* (*Lord*) (1880), 5 App. Cas. 273.

(*g*) *St. Benedict Hulm* (*Abbot*) *Case* (1317), Hale de Jure Maris, Part I., c. 5 (Hargrave, Law Tracts, p. 20). For meaning of "weir" in Salmon Fishery Acts, see p. 609, *post*. For other meanings, see *Neill* v. *Devonshire* (*Duke*), *supra*; *Malcolmson* v. *O'Dea*, *supra*; *A.-G.* v. *Emerson*, *supra*.

(*h*) *Hanbury* v. *Jenkins*, [1901] 2 Ch. 401.

(*i*) *Gabbett* v. *Clancy* (1845), 8 I. L. R. 299.

SECT. 11. Evidence of Title to Fisheries.

The existence of a weir in navigable rivers at the time of the passing of the Salmon Fishery Act, 1861 (*j*), is strong evidence of the antiquity of the fishery, because the statutes relating to weirs (*k*) from Edward III.'s reign and onwards made weirs, which were not in existence in the time of Edward I., illegal. Cutting weeds, building piers, taking gravel, fencing off drinking places for cattle, protecting the banks by stakes, if done by the owner of the fishery, are evidence of the ownership of the soil (*l*).

User by public.

1303. In the case of tidal waters, once it is shown that the water was made a several fishery before Magna Charta, no length of user by the public can give them any right, because the public cannot prescribe for a *profit à prendre in alieno solo*, nor can they acquire it under any Statute of Limitation, and an incorporeal right of fishery cannot be abandoned because it can only pass by deed (*m*).

Usage by the public, sufficient to raise a presumption of a similar usage from time immemoral, will not avail to displace a prescriptive right supported by written title and long possession (*n*).

In tidal and in non-tidal several fisheries user by the public will not avail to give the public a right to fish (*o*), but it may be evidence that the possession of the fishery is not in the person asserting a paper title to it (*p*).

User by indefinite bodies.

1304. User by uncertain and fluctuating bodies, as inhabitants of a town etc., has the same weight as acts by the public, but user by definite bodies, such as copyholders, may establish a right to a common of fishery (*q*).

User by riparian owners.

1305. When a claim is set up by a riparian owner as against the owner of a several fishery, the former must show that the exercise of the riparian right has been exclusive of the owner of the fishery, as proof that the latter had also regularly fished there would show that the riparian presumption did not arise, but that the former had only a common of fishery (*r*), or was a tenant in common of the fishery or a trespasser (*s*).

(*j*) 24 & 25 Vict. c. 109.

(*k*) Stat. (1351) 25 Edw. 3, stat. 3, c. 4; stat. (1371) 45 Edw. 3, c. 2; stat. (1402) 4 Hen. 4, c. 11; stat. (1423) 2 Hen. 6, c. 19 (all repealed as being obsolete); *Williams* v. *Wilcox* (1838), 3 Nev. & P. (Q. B.) 606; and *Leconfield* v. *Lonsdale* (1870), L. R. 5 C. P. 657, 675 *et seq.*

(*l*) *R.* v. *Old Alresford (Inhabitants)* (1786), 1 Term Rep. 358; *Hanbury* v. *Jenkins*, [1901] 2 Ch. 401; *A.-G.* v. *Emerson*, [1891] A. C. 649, 660.

(*m*) *Neill* v. *Devonshire (Duke)* (1882), 8 App. Cas. 135, *per* Lord SELBORNE, L.C., at p. 154.

(*n*) *Neill* v. *Devonshire (Duke)*, *supra*, at p. 156.

(*o*) *Neill* v. *Devonshire (Duke)*, *supra* (in tidal waters); *Smith* v. *Andrews*, [1891] 2 Ch. 678; *Blount* v. *Layard* (1888), cited [1891] 2 Ch. 681, n., C. A. (non-tidal river); *Pery* v. *Thornton* (1889), 23 L. R. Ir. 402.

(*p*) *Blount* v. *Layard*, *supra*.

(*q*) See title COMMONS, Vol. IV., pp. 470, 491.

(*r*) *Waterford Fishery District Conservators* v. *Connolly* (1889), 24 I. L. T. 7; compare *Hindson* v. *Ashby*, [1896] 2 Ch. 1, 9, C. A.

(*s*) *Beauman* v. *Kinsella* (1859), 11 I. C. L. R. 249, Ex. Ch.

SECT. 12.—*Rights and Obligations of Owners of Fisheries and Others.*

SECT. 12. Rights and Obligations etc.

1306. The owner of a fishery has the right to a free passage for fish to his fishery and a right to catch every fish finding its way there which he can by art or industry, but he must not obstruct the passage of fish up or down the river in a manner not essentially necessary to the exercise of the right of catching fish (*t*), nor do anything which may cause the water on his land to inundate his neighbour's fishery (*a*). A riparian owner who is not the owner of the fishery *ex adverso* his land must not make erections on the bed of the river which may damage the fishery (*b*); but he may fence in drinking places for his cattle and do works to the banks reasonably necessary for the protection and enjoyment of his land (*c*). No one has any right to pollute the water of a several fishery (*d*). If the fishery be a public one, pollution, being a nuisance, cannot be prescribed for against the public (*e*), and if it be a several oyster fishery created under the Sea Fisheries Act, 1868, or a private oyster bed, it is protected by the Sea Fisheries Act, 1868 (*f*).

Rights of owner of fishery.

SECT. 13.—*Ownership of Fish Caught and Larceny.*

1307. There is no absolute property in living fish other than oysters, mussels, and cockles on certain lands, for fish are wild animals, and are not goods and chattels; but there may be a qualified property in them as in other wild animals (*g*).

Qualified property only.

1308. Unless reclaimed in possession, as in a tank, stew or net, fish are not the subject of larceny at common law, but in other cases they are the subject of larceny by statute (*h*).

When fish are the subject of larceny.

(*t*) *Hamilton* v. *Donegal* (*Marquis*) (1795), 3 Ridg. Parl. Rep. 267; *Barker* v. *Faulkner* (1898), 79 L. T. 24.

(*a*) *Courtney* v. *Collet* (1697), 1 Ld. Raym. 272 (removing a dam).

(*b*) *Bridges* v. *Highton* (1865), 11 L. T. 653.

(*c*) *Hanbury* v. *Jenkins*, [1901] 2 Ch. 401.

(*d*) *Aldred's Case* (1610), 9 Co. Rep. 57 b, 59 a. As to easement to pollute water, see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 317. As to pollution of water generally, see titles NUISANCE; WATERS AND WATERCOURSES.

(*e*) *A.-G.* v. *Birmingham Borough Council* (1858), 4 K. & J. 528; *Bidder* v. *Croydon Local Board of Health* (1862), 6 L. T. 778; *A.-G.* v. *Luton Local Board of Health* (1856), 2 Jur. (N. S.) 180; *Oldaker* v. *Hunt* (1855), 6 De G. M. & G. 376, C. A.; *Fitzgerald* v. *Firbank*, [1897] 2 Ch. 96, C. A.

(*f*) 31 & 32 Vict. c. 45, ss. 57, 58; *Foster* v. *Warblington Urban Council*, [1906] 1 K. B. 648, C. A.; see judgment of WALTON, J., S. C. (1905), 21 T. L. R. 214; see also title NUISANCE.

(*g*) See title ANIMALS, Vol. I., p. 365; *Child* v. *Greenhill* (1639), Cro. Car. 553; *R.* v. *Steer* (1704), 3 Salk. 291. There is not sufficient property in fish nearly enclosed in a net to maintain an action of trespass against a person who prevents their capture (*Young* v. *Hichens* (1844), 6 Q. B. 606). As to ownership of and property in oysters, mussels, and cockles, see Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), ss. 51, 52, 55; Sea Fisheries Act, 1884 (47 & 48 Vict. c. 27), s. 1; and p. 626, *post*.

(*h*) 2 East, P. C. 610. See title ANIMALS, Vol. I., p. 370; *Greye's Case* (1594), Owen, 20; Paterson's Fishery Laws, 2nd ed., ch. 5; *R.* v. *Steer*, *supra*. See, also, title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 641.

SECT. 13. **Ownership of Fish Caught and Larceny.**

Dead fish.

1309. Dead fish are the subject of larceny, for when found and killed they become the absolute property of the owner of the fishery or of the person in whose possession they rightfully are (*i*). In the case of capture and killing by trespassers they are not the subject of larceny (*k*).

Taking and destroying fish.

1310. Everyone who unlawfully and wilfully takes or destroys any fish in any water which runs through or is on any land adjoining or belonging to the dwelling-house of the owner of such water or to the person having a right of fishery therein, is guilty of a misdemeanour; but if the offender was taking or destroying, or attempting to take or destroy, the fish in such water by angling between the beginning of the last hour before sunrise and the expiration of the first hour after sunset he is only liable to a fine not exceeding £5 (*l*).

Everyone who unlawfully and wilfully takes or destroys, or attempts to take or destroy, any fish in any other water, but in water which is private property or in which there is any private right of fishery, is liable to pay, over and above the value of the fish taken or destroyed, a sum not exceeding £5, but if the offender was angling between the beginning of the last hour before sunrise and the expiration of the first hour after sunset he is only liable to pay a sum not exceeding £2 (*m*).

Seizure of fishing implements.

In the case of an offender against the provisions of the Larceny Act, 1861 (*n*), the owner of the ground, water, or fishery where such offender shall be found, his servant, or any person authorised by him, may demand from such offender any rod, line, hook, net or other implement for taking or destroying fish which are then in his possession, and on his refusal to deliver them up may seize and take them from him for the use of such owner.

If, however, the offender was angling between the hours above

(*i*) *R.* v. *Mallison* (1902), 86 L. T. 600, C. C. R. Fish caught in the high seas are the property of the owner of the fishing vessel on which they were landed.

(*k*) See title ANIMALS, Vol. I., p. 371. Under the Salmon and Freshwater Fisheries Acts, poachers are in some instances liable to forfeit the fish they have caught (Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), ss. 12, 14, 15, 17, 21; Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 64; Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 11; Freshwater Fisheries Act, 1884 (47 & 48 Vict. c. 11), s. 1). The fish so forfeited are disposed of as the court directs (Salmon and Freshwater Fisheries Act, 1892 (55 & 56 Vict. c. 50), s. 4).

(*l*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 24. "Take" here means "catching," and manual possession is not required (*R.* v. *Glover* (1814), Russ. & Ry. 269, C. C. R.). The term "fish" in this Act is used in its ordinary popular sense and includes shell-fish (*Caygill* v. *Thwaite* (1885), 33 W. R. 581 (freshwater crayfish)). The term "water" includes tidal and non-tidal water (*Paley* v. *Birch* (1867), 8 B. & S. 336). "Adjoining" means "in actual contact with" (*R.* v. *Hodges* (1829), Mood. & M. 341).

(*m*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 24. For meaning of terms "fish" and "water," see note (*l*), *supra*. On a prosecution for an offence against the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 24, it is sufficient to prove that the offence was committed, when the boundary of any parish, township, or vill is in or by the side of the water, either in the parish, township, or vill named in the indictment, or information, or in any parish, township, or vill adjoining thereto (*ibid.*). See also title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 641.

(*n*) 24 & 25 Vict. c. 96.

mentioned, the taking from or delivery up by him of any implement used by anglers exempts him from the payment of any damages or a penalty for angling (*o*).

SECT. 13. Ownership of Fish Caught and Larceny.

An offender not being an angler in the daytime may be immediately apprehended without a warrant by any person and forthwith taken before a neighbouring justice of the peace (*p*).

Arrest of night-fisher.

Everyone who steals any oysters or oyster brood from any oyster bed laying or fishery being the property of any other person, and sufficiently marked out and known as such, commits a felony, and is liable to be punished as in the case of a simple larceny. Everyone who unlawfully and wilfully uses any dredge or any net, instrument, or engine whatsoever within the limits of any such oyster bed laying or fishery for the purpose of taking oysters or oyster brood, though none be taken, commits a misdemeanour, and is liable to imprisonment for any term not exceeding three months with or without hard labour (*q*).

Stealing :—

(i.) Oysters ;

It would seem that it is a felony punishable as a felony at common law to steal oysters, mussels or cockles, in or on any oyster, mussel or cockle bed within the limits of a several oyster, mussel or cockle fishery granted under the Sea Fisheries Act, 1868, or oysters in or on any private oyster bed, and sufficiently marked out or sufficiently known as such, because such fish are the absolute property of the grantee or of such owner, and are deemed to be in his actual possession for all purposes civil or criminal (*r*).

(ii.) Mussels.

(iii.) Cockles.

Part IV.—Fisheries in Relation to Navigation.

1311. Where the right of navigation exists, though it is simply a right of way (*a*), yet it is a right which takes precedence over the right of fishing, and the navigator may place his ship in a fishery and stay there as long as reasonably necessary for the purposes of

Navigation over fisheries.

(*o*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 25. A tenant of a fishery has no power to seize fishing tackle unless authorised by the owner, and no person is entitled to take the fish caught by the offender except they be the subject of larceny at common law; see Paterson's Fishery Laws, 2nd ed. at p. 5. When taking the tackle of an offender no more force than is necessary must be used (*Wisdom* v. *Hodson* (1833), 3 Tyr. 811). The term "angling" does not include the use of rough lines consisting of two pegs driven into the ground with lines and hooks and a stone attached (*Barnard* v. *Roberts* (1907), 96 L. T. 648; 71 J. P. 277).

(*p*) Larceny Act, 1861 (24 & 25 Vict. c. 96, s. 103). As to arrest without a warrant generally, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 300 *et seq.*

(*q*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 26.

(*r*) Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), ss. 51, 52, 55; Sea Fisheries Act, 1884 (47 & 48 Vict. c. 27), s. 1. The terms "oysters" and "mussels" respectively include brood, ware, half-ware, spat and spawn of oysters and mussels respectively (Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), s. 28); see, further, as to property in and protection of shell-fish, p. 626, *post.*

(*a*) *Orr Ewing* v. *Colquhoun* (1877), 2 App. Cas. 839. The right of anchoring is a necessary part of the right of navigation (see *Gann* v. *Whitstable Free Fishers* (1865), 1 H. L. Cas. 192, 208; *A.-G.* v. *Wright*, [1897] 2 Q. B. 318, C. A.).

PART IV. Fisheries in Relation to Navigation.

navigation, but he must not act wantonly or maliciously so as to work an injury to the fishery (*b*). In the exercise of his right the navigator must not let his vessel ground on the fishery so as to do damage, unless in the course of her navigation it becomes necessary so to do (*c*). If he acts negligently in this respect he may be sued at common law, or his ship may be arrested in an admiralty action (*d*).

Remedy for obstruction of navigation.

1312. Fisheries must not be carried on so as to be a nuisance to navigation (*e*), but the navigator must not damage the fishery or abate an obstruction unless it does him some special injury beyond that which is suffered by the rest of the public (*f*). His remedy is by indictment (*g*). Erections in the soil, originally not nuisances to navigation, may become so owing to the navigable channel changing its course, because, unless authorised by statute, they can have been erected in navigable waters subject only to the paramount right of navigation (*h*).

Rights of sailing fishing boats.

1313. An exception to the rule that the right of navigation is paramount to the right of fishing is made in favour of sailing fishing boats. All vessels under way must keep out of the way of sailing vessels or boats fishing with nets, lines or trawls, when such latter vessels or boats are not obstructing a fairway used by vessels other than fishing vessels (*i*).

This rule applies to ships of all countries when navigating within the territorial waters of this kingdom in which the Collision Regulations, 1910, apply, and to vessels of Great Britain, the Argentine Republic, Austria-Hungary, Belgium, Brazil, Bulgaria, Chili, China, Costa Rica, Denmark, Ecuador, Egypt, France, Germany, Greece, Guatemala, Italy, Japan, Mexico, the Netherlands, Norway, Peru, Portugal, Roumania, Russia, Siam, Spain, Sweden, Turkey, the United States, and Venezuela, when navigating the high seas outside the territorial limits (*k*).

(*b*) *Anon.* (1808), 1 Camp. 517, n.

(*c*) *The Octavia Stella* (1887), 6 Asp. M. L. C. 182; *Colchester Corporation* v. *Brooke* (1845), 7 Q. B. 339; see, also, *The Bien* (1910), 27 T. L. R. 9.

(*d*) *The Swift*, [1901] P. 168. As to arrest of ship, see title ADMIRALTY, Vol. I., pp. 81 *et seq.*

(*e*) *Colchester Corporation* v. *Brooke*, *supra*; Hale de Portibus Maris (Hargreave, Law Tracts, p. 85).

(*f*) *Williams* v. *Wilcox* (1838), 8 Ad. & El. 314; *Dimes* v. *Petley* (1850), 15 Q. B. 276, 283.

(*g*) *R.* v. *Betts* (1850), 16 Q. B. 1022.

(*h*) *Williams* v. *Wilcox*, *supra*.

(*i*) Collision Regulations (1910), art. 6 (Statutory Rules and Orders, 1910, No. 1113); Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 418; see, further, title SHIPPING AND NAVIGATION.

(*k*) *Ibid.*

Part V.—Statutory Enactments Relating to Salmon, Trout, Char, and Freshwater Fisheries.

SECT. 1.—*Introduction and Definitions.*

SECT. 1. Introduction and Definitions.

History of statutory regulations as to salmon and freshwater fish.

1314. The salmon and freshwater fisheries have been the subject of numerous statutes for their regulation from the reign of Henry III. onwards. With the exception of Magna Charta, the Statute De Prerogativa Regis, and a few local Acts, the statutes of date prior to 1861 have been repealed, and these fisheries are now regulated chiefly by the Salmon and Freshwater Fisheries Acts, 1861—1892, the Fisheries (Norfolk and Suffolk) Act, 1896, and the Salmon and Freshwater Fishery Act, 1907 (*l*).

Object of legislation.

One of the aims of the legislation from the first was to remove obstructions to the passage of fish up the rivers, and a fresh endeavour to effect this object was made by the Salmon Fishery Act, 1861 (*m*), which forbade the use of fixed engines which were not lawfully exercised at the time of the passing of the Act, and required that fishing weirs and fishing mill dams then lawfully in use were to be so constituted as to allow of the passage of fish. In consequence of these provisions it became necessary to ascertain what fishing machines were lawful, and by the Salmon Fishery Act, 1865 (*n*), a Commission was appointed to inquire as to the legality of all fixed engines, fishing weirs, and fishing mill dams in use within the limits of the Salmon Fishery Acts, 1861 and 1865.

Special Commissioners of English Fisheries.

The Commissioners thus appointed were required to give certificates for fixed engines, which are conclusive evidence as to their legality, and, with regard to fishing weirs and fishing mill dams and fixed engines, their duty was to remove, or render incapable of catching fish, such of them as they found to be illegal; but they appear to have had no power to grant certificates as to the legality of fishing weirs and fishing mill dams (*o*).

(*l*) Besides the statutes relating to these fisheries generally, there are various Acts relating to particular rivers or localities, *e.g.*, the Derwent (3 & 4 Vict. c. xliv.); Milford Haven (46 Geo. 3, c. xix.); Norfolk and Suffolk (40 & 41 Vict. c. xcviii.); Severn and Verniew (18 Geo. 3, c. 33); Solway (40 & 41 Vict. c. ccxl.); Stour River (Essex) (4 & 5 Ann. c. 2, local); Taw and Torridge (38 & 39 Vict. c. clxx.); Tees (21 & 22 Vict. c. cxli.; 56 & 57 Vict. c. cxc.); Thames (57 & 58 Vict. c. clxxxvii.); Tweed, various public and local Acts: see report of Tweed Commissioners (Parliamentary Papers, Vol. 46 of 1846). Inasmuch as these Acts have a purely local application and vary considerably in their provisions, it has been found impracticable to set out in detail in this article the regulations affecting any particular river. For such regulations reference should be made to the particular Act in question. Certain provisions of the Freshwater Fisheries Acts, 1878 and 1884, apply to Norfolk and Suffolk (Freshwater Fisheries Act, 1884 (47 & 48 Vict. c. 11), s. 8).

(*m*) 24 & 25 Vict. c. 109.

(*n*) 28 & 29 Vict. c. 121.

(*o*) But see *Devonshire (Duke)* v. *Drohan*, [1900] 2 I. R. 161, a case under the Salmon Fishery (Ireland) Act, 1863 (26 & 27 Vict. c. 114), s. 9, where a certificate given by the Special Commissioners in 1866 as to the legality of a weir was held to be conclusive against all the world as to such legality.

SECT. 1. Introduction and Definitions.

Boards of conservators.

Under the Salmon Fishery Act, 1865 (*p*), salmon fishery districts were created and regulated by boards of conservators. In 1878, fishery districts and boards of conservators for trout and char fisheries were sanctioned, and numerous provisions relating to salmon were applied by reference to trout and char (*q*). In 1884 the coarse fish were dealt with by the Freshwater Fisheries Act, 1884 (*r*), in the same way. There may be boards of conservators having power as to salmon, boards of conservators with power as to trout and char, and boards of conservators with power as to coarse fish (*s*).

Powers of Board of Agriculture to abolish boards.

By the Salmon and Freshwater Fisheries Act, 1907 (*t*), the Board of Agriculture and Fisheries has power, on the application of certain persons, to abolish any board of conservators and to create a fresh board with all the powers of the Salmon and Freshwater Fisheries Acts or such modifications thereof as the Board of Agriculture and Fisheries may determine (*u*).

Definition of "salmon."

1315. "Salmon" includes all migratory fish of the genus salmon, whether known as salmon, cock or kipper, kelt, laurel, girling, grilse, botcher, blue cock, blue pole, fork tail, mort, peal, herring peal, may peal, pugg peal, harvest cock, sea trout, white trout, sewin, buntling, guiniad, tubs, yellow fin, sprod, herling, whiting, bull trout, whitling, scurf, burn tail, fry, samlet, smoult, smelt, skirling or scarling, parr, spawn, pink, last spring, hepper, last brood, gravelling, shed, scad, blue fin, black tip, fingerling, brandling, brondling, or by any other local name (*a*).

Definition of "young of salmon."

1316. "Young of salmon" includes all young of the salmon species, whether known by the names of fry, samlet, smoult, smelt, skirling or skarling, par, spawn, pink, last spring, hepper, last brood, gravelling, shed, scad, blue fin, black tip, fingerling, brandling, brondling, or by any other name, local or otherwise (*a*).

Definition of "river."

1317. "River" includes such portion of any stream or lake with its tributaries, and such portion of an estuary, sea or sea coast as may from time to time be declared by the Board of Agriculture and Fisheries to belong to such river (*b*). "Salmon river" means any river as above defined frequented by salmon or young of salmon (*c*).

Definition of "freshwater fish."

1318. "Freshwater fish" for the purposes of the Freshwater Fisheries Act, 1878, includes all kinds of fish (other than pollan,

(*p*) 28 & 29 Vict. c. 121.
(*q*) Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39).
(*r*) 47 & 48 Vict. c. 11.
(*s*) The Salmon and Freshwater Fisheries Acts are a good example of the confusion that is caused by legislation by reference.
(*t*) 7 Edw. 7, c. 15.
(*u*) *Ibid.*, s. 2; and see p. 598, *post*.
(*a*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 4.
(*b*) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), ss. 3, 4, 5. As to what may be described as a tributary of a river, see *Merricks* v. *Cadwallader* (1881), 51 L. J. (M. C.) 20; *Hall* v. *Reid* (1882), 10 Q. B. D. 134, n.; *Harbottle* v. *Terry* (1882), 10 Q. B. D. 131; *George* v. *Carpenter*, [1893] 1 Q. B. 505; *Evans* v. *Owens*, [1895] 1 Q. B. 237; *Stead* v. *Nicholas*, [1901] 2 K. B. 163; *Moses* v. *Iggo*, [1906] 1 K. B. 516; *Cook* v. *Clareborough* (1903), 70 J. P. 252. As to rivers generally, see title WATERS AND WATERCOURSES.
(*c*) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 3.

trout, char, and eels) which live in fresh water, except those kinds which migrate to or from the open sea (*d*). For the purposes of the Freshwater Fisheries Act, 1884 (*e*), the term means any fish living permanently or temporarily in fresh water exclusive of salmon (*f*).

SECT. 2.—*Supervision of Fisheries.*

Supervision by Board of Agriculture and Fisheries.

1319. The general superintendence of salmon and freshwater fisheries throughout England is vested in the Board of Agriculture and Fisheries (*g*). To effect this the Board has power to appoint inspectors, and settle their duties (*h*). These inspectors must make reports to the Board containing a statistical account of the salmon and freshwater and sea fisheries over which the Board of Trade had jurisdiction in 1886, with such other information as may be collected, and suggestions for their regulation and improvement (*i*); and these reports the Board must lay annually before Parliament (*j*).

SECT. 3.—*Powers and Duties of the Board of Agriculture and Fisheries under the Salmon and Freshwater Fisheries Acts*, 1861—1892.

SUB-SECT. 1.—*As to Salmon Fisheries.*

Powers of Board in salmon fisheries.

1320. When the owner of a fishery or a board of conservators desires to attach a fish pass to a dam in existence in 1861 the Board of Agriculture and Fisheries has power to consent thereto, and to approve the form and dimensions of such pass, provided no injury be done to the milling power, or to the supply of water to or of any navigable river, canal, or other inland navigation. This consent cannot be given unless the owner of the dam agrees, or the Board has heard and considered his objections (*k*).

Fish passes.

If it appears that it is not possible to attach a fish pass to the dam, the Board, on petition by the owner of the fishery or by the board of conservators to be allowed to purchase so much of the bank adjoining the dam as may be necessary, and after certain formalities have been performed, may, by provisional order, empower the owner of the fishery or the board of conservators to put in force the

(*d*) Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 11, as amended by Freshwater Fisheries Act, 1886 (49 & 50 Vict. c. 2), s. 1.

(*e*) 47 & 48 Vict. c. 11.

(*f*) *Ibid.*, s. 6.

(*g*) Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31), transferring the powers and duties of the Board of Trade under the Salmon and Freshwater Fisheries Acts and the Norfolk and Suffolk Fisheries Acts.

(*h*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 31; Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31), s. 1 (1)—(5).

(*i*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 32; Salmon and Freshwater Fisheries Act, 1886 (49 & 50 Vict. c. 39), s. 6.

(*j*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 32. The reports are annually printed as a Parliamentary paper. Besides the general superintendence, the Board has certain definite statutory powers for the regulation of salmon and freshwater fisheries. Many districts of the kingdom are also under the supervision of boards of conservators appointed under the Salmon and Freshwater Fishery Acts, as to which see p. 594, *ante*, and pp. 600 *et seq.*, *post*.

(*k*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), ss. 23, 24.

SECT. 3. Powers and Duties etc.

powers of the Lands Clauses Consolidation Acts (*l*) with regard to the purchase of land otherwise than by agreement (*m*).

Obstructions to passes.

In the case of certain new obstructions to the passage of fish and of certain alterations in existing obstructions, the Board is to approve the form and dimensions of the fish passes to be placed at these obstructions and, on failure to carry out the Board's requirements in this respect, may cause the work to be done and may recover the expenses in a summary manner from the person in default (*n*). The Board has power to approve and certify any fish pass that now is or hereafter shall be constructed, if they are of opinion that it is efficient in all respects and for all purposes as if it had been constructed under the Salmon Fishery Act, 1861, with the consent and approbation of the Secretary of State (*o*).

On the application of a board of conservators stating that a fish pass or free gap within their district is in their opinion capable of improvement, the Board may direct any alteration, or direct a new fish pass or free gap to be made in another site, provided no injury be done to the supply of water to or of any navigable river, canal, or other inland navigation (*p*).

Approval of gratings.

1321. The Board of Agriculture and Fisheries is the authority to approve of the gratings which have to be placed over artificial streams to prevent the descent of salmon (*q*). When gratings are constructed under the powers of the Salmon Fishery Act, 1873, the Board of Agriculture and Fisheries has power to cause any watercourse, mill race, cut, leat, or other channel to be widened at the expense of the board of conservators for the district, so far as is necessary to compensate for the diminution of the flow of water; or if this be not done, the Board must take some other means to prevent the flow of water being prejudicially diminished or otherwise injured (*r*). The Board also has power to approve means for preventing the ingress of salmon into streams in which they, or their spawning beds, are, from the nature of the channel, liable to be destroyed (*s*).

To alter fishery districts.

1322. On due application by a board of conservators of a salmon fishery district, the Board of Agriculture and Fisheries may, by their certificate, enlarge, reduce, or alter the district, either by uniting it with any other district or districts, or combining it with any other part or parts of a district or districts, or by severing any

(*l*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18); Lands Clauses Consolidation Acts Amendment Act, 1860 (23 & 24 Vict. c. 106); Lands Clauses Consolidation Act, 1869 (32 & 33 Vict. c. 18); Lands Clauses (Umpire) Act, 1883 (46 & 47 Vict. c. 15); Lands Clauses (Taxation of Costs) Act, 1895 (58 & 59 Vict. c. 11). As to these powers, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 1 *et seq.*

(*m*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), ss. 49, 50.

(*n*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 25; Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 46.

(*o*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 52.

(*p*) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 32.

(*q*) Salmon and Freshwater Fisheries Act, 1886 (49 & 50 Vict. c. 39), s. 3; Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 13.

(*r*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), ss. 58, 59.

(*s*) *Ibid.*, s. 60.

part from such district and forming it into a separate district, or uniting it with any other district, or by adding to such district any place not yet included in any district (*t*). When the effect of this certificate is to include an additional portion of a county in the district, the Board must appoint additional members to the existing board of the district. When the effect is the reverse, the Board has to specify the reduction to be made in the number of members representing that county (*a*).

On the application of a county council comprised or partly comprised in a fishery district, the Board may, after certain requirements have been fulfilled, alter the number of conservators to be appointed for all or any counties comprised or partly comprised in such district (*b*).

Powers as to licences.

1323. The Board of Agriculture and Fisheries may consent to the mortgage of licence duties and other property of boards of conservators for the purpose of defraying costs, charges, and expenses to be incurred under the Salmon Fishery Acts, 1861 and 1865 (*c*), and may sanction the scale of licence duties for fishing weirs, fishing mill dams, putts, putchers, fixed nets, and other fixed instruments or devices, movable nets, or other movable instruments or devices, rods and lines, and for the general licence for owners of a several fishery (*d*), and approve the form of licence to be issued under the Salmon Fishery Act, 1861; and the Board may from time to time consent and approve of the variation of the scale of licence duties in force in a district, and, for the purpose of improvements to be made for facilitating the passage of salmon, may sanction additional licence duties of 25 per cent. throughout the district (*e*).

Approval of bye-laws of conservators.

1324. All bye-laws made by a board of conservators have to be approved by the Board of Agriculture and Fisheries. Before doing so the Board must hold an inquiry if an owner or occupier of a fishery or any licensee gives notice of objection to certain bye-laws and complies with the statutory requirements in this respect (*f*); but the Board appear to have no power on their own initiative to annul a bye-law once approved.

As to close time.

1325. In salmon fishery districts the Board has power to approve the exemption of the whole or any part of the district from the close time (15th March to 15th June) for all or any kinds of fish, other than pollan, trout, char, and eels, which live in fresh water, except those kinds which migrate to or from the open sea (*g*).

(*t*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 5.

(*a*) *Ibid.*, s. 6.

(*b*) *Ibid.*, s. 9; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (xiii.). For special provisions in this respect for the river Esk, see Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 12.

(*c*) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 28.

(*d*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 21; Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 34.

(*e*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), ss. 25, 57.

(*f*) See *Ibid.*, s. 41. Objection can only be taken to bye-laws as to close time, nets, mesh, and netting at the mouths.

(*g*) Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 11 (7); Freshwater Fisheries Act, 1886 (49 & 50 Vict. c. 2), s. 1; and see p. 615, *post*.

SECT. 3. Powers and Duties etc.

As to appointment of officer.

1326. The Board of Agriculture and Fisheries have power to appoint in writing an officer to see that the provisions relating to the consignment of salmon trout and char between the 3rd September and 1st February are not evaded (*h*).

SUB-SECT. 2.—*As to Trout and Char and Freshwater Fish other than Salmon.*

Powers of Board as to trout and other freshwater fish.

1327. The Board of Agriculture and Fisheries have the same powers with regard to the formation, alteration, confirmation, and dissolution of fishery districts for trout and char, and districts for freshwater fish other than salmon, and for the appointment and supervision of the powers of conservators, as they have with regard to salmon fishery districts and conservators (*i*).

SECT. 4.—*Powers and Duties of the Board of Agriculture and Fisheries under the Salmon and Freshwater Fisheries Act*, 1907.

Power of Board to make provisional orders regulating fisheries.

1328. By the Salmon and Freshwater Fisheries Act, 1907 (*k*), the Board of Agriculture and Fisheries are empowered upon the application of a board of conservators constituted under the Salmon and Freshwater Fisheries Acts (*l*), or of a county council, or of the owners of one-fourth in value of the private fisheries proposed to be regulated, or of a majority of the persons holding licences to fish in public waters within the area of the proposed order, to make a provisional order for the regulation of salmon or freshwater fisheries, or either of them, within any area (*l*) other than in waters in which the Board have licensed the business of artificial propagation or rearing of salmon or trout (*m*).

Procedure.

If the Board consider that a *primâ facie* case is made out by the applicants for the making of an order they must hold a local inquiry, and, if satisfied of the propriety of making an order, prepare a draft order and give certain notices, in some newspaper in general circulation within the area to which the draft relates, as to the time within and the manner in which notice of objections to the draft order are to be lodged and as to where copies of the draft order can be inspected and obtained (*n*). After the receipt of

(*h*) Salmon and Freshwater Fisheries Act, 1892 (55 & 56 Vict. c. 50), s. 3.

(*i*) Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 6; Freshwater Fisheries Act, 1884 (47 & 48 Vict. c. 11), s. 2. The Salmon Fishery Acts, 1861—1876, contain no powers for the dissolution of fishery districts.

(*k*) This Act does not apply to the river Tweed, as defined by bye-law under the Salmon Fisheries (Scotland) Act, 1862 (25 & 26 Vict. c. 97), or to its tributaries. As to special legislation relating to the Tweed and other rivers, see p. 593, *ante*.

(*l*) Salmon and Freshwater Fisheries Acts, 1861—1892, and the Fisheries (Norfolk and Suffolk) Act, 1896 (59 & 60 Vict. c. 18); see Salmon and Freshwater Fisheries Act, 1907 (7 Edw. 7, c. 15), s. 8 (3).

(*m*) Salmon and Freshwater Fisheries Act, 1907 (7 Edw. 7, c. 15), ss. 1, 2 (4), 3. Provisional orders have been made as to the Usk (Usk Fisheries Provisional Order Confirmation Act, 1908 (8 Edw. 7, c. cxl.)) and the Wye (Wye Fisheries Provisional Order Confirmation Act, 1908 (8 Edw. 7, c. cxli.)).

(*n*) Salmon and Freshwater Fisheries Act, 1907 (7 Edw. 7, c. 15), s. 4 (1).

any objections to the draft order the Board may, if they think it expedient, and must, if any county council having authority within the area of the proposed order object, hold a local inquiry with respect to the objections, and after considering the objections and the report of the officer who has held the inquiry (if any) the Board must settle the terms of the draft order (*o*).

Confirmation by Parliament.

Any provisional order made by the Board must be submitted to and confirmed by Parliament before it has any force. Once the Bill confirming the order is pending in either House of Parliament the Board is powerless to revoke it or any part of it, but it is open to any person to petition against the order, and the order is then referred to a select committee, at which the petitioner is allowed to appear and oppose as in the case of private Bills (*p*).

Repeal or amendment of provisional order.

An original order can be repealed, altered, or amended only by a further provisional order made by the Board in like manner as the original order and confirmed by Parliament (*q*). It would seem that the Board cannot on its own motion promote a provisional order to alter or repeal an original order, and a board of conservators constituted under the Salmon and Freshwater Fisheries Act, 1907 (*r*), cannot effectively move the Board for a provisional order affecting an original order (*s*).

Scope of provisional order.

1329. A provisional order may provide for (*t*):—

(a) Defining the area within which the order is to apply.

(b) The constitution and incorporation of a board of conservators.

(c) The application to a board of conservators and the area so defined, either with or without modification, of all or any of the provisions of the Salmon and Freshwater Fisheries Acts with respect to boards of conservators and fishery districts.

(d) The imposition, collection, and recovery of contributions to be assessed on private fisheries regulated by the order or on the owners or occupiers thereof.

(e) Powers for the conservators to erect and work on the foreshore (*u*) specified in the order fixed engines for salmon upon certain conditions.

(f) The modification, with relation to the fisheries within the area, of any of the provisions of the Salmon and Freshwater Fisheries Acts or of any local Act which relates to the regulation of fisheries.

(g) The abolition of any board of conservators established under the Salmon and Freshwater Fisheries Act within the area, and the transfer of their property and liabilities to the board of conservators

(*o*) Salmon and Freshwater Fisheries Act, 1907 (7 Edw. 7, c. 15), s. 4 (2).

(*p*) *Ibid.*, s. 5 (1), (2), (3). As to such procedure, see title PARLIAMENT.

(*q*) *Ibid.*, s. 5 (4).

(*r*) *Ibid.* As to such boards, see p. 607, *post.*

(*s*) Only boards of conservators constituted under the Salmon and Freshwater Fisheries Acts or certain other persons named in the Salmon and Freshwater Fisheries Act, 1907 (7 Edw. 7, c. 15), s. 3, can petition the Board of Agriculture and Fisheries (*ibid.*, s. 3).

(*t*) Salmon and Freshwater Fisheries Act, 1907 (7 Edw. 7, c. 15), s. 2.

(*u*) As the foreshore is that portion of the kingdom covered and uncovered by the ordinary tides (*A.-G.* v. *Chambers* (1854), 4 De G. M. & G. 206), the conservators have no power to work a fixed engine below the low-water mark of ordinary tides.

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constituted under the order, and the making of such adjustment between the two bodies as may appear to the Board to be necessary or expedient.

(h) Requiring returns to be made by persons taking fish within the area.

(i) Payment out of any funds in the hands of the board constituted by the order of the costs of the applicants in obtaining the order and its confirmation by Parliament (*x*).

(j) General regulation of the fisheries within the area.

The order may also contain any incidental, consequential, or supplemental provisions, including provisions for the payment of compensation to persons injuriously affected by the order which may appear to be necessary or proper for the purposes of the order (*y*).

Power to make rules etc.

The Board has also power to make rules to provide for proper notices being given to owners, lessees, and occupiers of land affected, on application for the inclusion in a provisional order of a power to acquire a part of the foreshore and rights thereto and thereover (*a*). The Board may also grant and revoke licences for carrying on the business of the artificial propagation or rearing of salmon or trout (*b*).

SECT. 5.—*Boards of Conservators under the Salmon and Freshwater Fisheries Acts*, 1861—1892.

SUB-SECT. 1.—*Creation of Fishery Districts and Boards of Conservators.*

Creation of fishery districts.

1330. As by far the greater part of the kingdom has been divided into fishery districts and subjected to boards of conservators, it is only necessary to state shortly the law by which this is effected.

On the application of a county council to the Board of Agriculture and Fisheries to form any "salmon river" into a fishery district, that department can issue a certificate defining the limits of the river and the fishery district formed (*c*).

Appointment of boards of conservators.

1331. If the fishery district is wholly in one county the county council appoints the board of conservators for the district, fixing the time and place for its first meeting (*d*). If the district does not lie wholly within one county, then the county councils within which

(*x*) The costs of a county council are to be paid out of the county fund; see Salmon and Freshwater Fisheries Act, 1907 (7 Edw. 7, c. 15), s. 6.

(*y*) Salmon and Freshwater Fisheries Act, 1907 (7 Edw. 7, c. 15), s. 2 (1).

(*a*) *Ibid.*, s. 2 (3); see *ibid.*, s. 7, as to consent of the Crown and Duchies of Lancaster and Cornwall to the order.

(*b*) *Ibid.*, s. 2 (4).

(*c*) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), ss. 4, 5; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (xiii.). A "salmon river" means any river frequented by salmon or young of salmon, and "river" includes such portion of any stream or lake, with its tributaries, and such portion of an estuary, sea or sea coast, as may be declared by the Board of Agriculture and Fisheries (Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 3). As to meaning of tributary, see p. 594, *ante*. The department may enlarge the limits of the district to any extent (*R.* v. *Grey* (*Sir George*) (1866), L. R. 1 Q. B. 469).

(*d*) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 6.

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any part of such district lies appoint three members of each council as a joint committee (*e*). This committee then determines the number of conservators to be appointed as a board, the number on the board to be appointed by each county, the names of the first members, of whom some are *ex officio* members (*f*), the time or place for the first meeting, and the county council by which the accounts of the fishery board are to be audited (*g*).

The board of conservators so appointed is a perpetual corporation with power to make contracts and to sue and be sued (*h*).

Procedure of board of conservators.

1332. The fishery board has to meet for the dispatch of its business, for which a quorum consisting of at least three members is required. An extraordinary meeting may be summoned on the requisition of three members, and its decisions are made by a majority of votes of members voting, the chairman having a casting vote in the event of equality in votes. The procedure used at the meetings is decided from time to time by the board (*i*). The board may appoint committees and lay down rules for their guidance (*k*).

The acts of a board of conservators are evidenced by any minute signed by the chairman of the meeting, or by the chairman of the next meeting (*l*).

SUB-SECT. 2.—*Annual Election of Boards of Conservators.*

Members of boards of conservators.

1333. Members of boards of conservators hold office for one year, but are eligible for reappointment (*m*). When appointed by a county council they are appointed in March, and by county boroughs in November (*n*).

1334. Besides the members appointed by the councils annually, and the *ex officio* members, there are representative members who are elected on a day fixed by the chairman of the board for the preceding year (*o*). These members represent the fishermen who have paid licence duty to fish for salmon (otherwise than by rod and line) in public or common waters, or both, during the last preceding fishing season (*p*).

The number of such representative members for the ensuing year is fixed by the board of conservators at a meeting, held after the commencement of the annual close season in each year, by ascertaining the amount of licence duty paid in respect of licences

(*e*) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), ss. 7, 8.
(*f*) *I.e.*, the owner or the occupier of a fishery rated to the relief of the poor on a rental of £30 a year, or the owner of lands of an annual value of £100 having a frontage on the river of one mile (Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 26).
(*g*) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), ss. 11, 12.
(*h*) *Ibid.*, s. 21.
(*i*) *Ibid.*, s. 22.
(*k*) *Ibid.*, s. 23.
(*l*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 35.
(*m*) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 15.
(*n*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (xiii.).
(*o*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), ss. 29, 30 (2).
(*p*) *Ibid.*, s. 29.

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for fishing otherwise than by rod and line in public or common waters, or both. If the amount does not exceed £50 one member is to be elected, and an additional member is to be elected for every additional £50 or part thereof (*q*).

Election of members.

1335. The election is by voting paper sent to each person qualified to vote who is resident within or the owner of land within or within ten miles of the boundary of the fishery district (*r*). A voter is entitled to vote as follows:—On the licence duty paid exceeding £1 and not exceeding £2, one vote for each member to be elected; exceeding £2 and not exceeding £5, two such votes; exceeding £5 and not exceeding £10, three such votes; exceeding £10 and not exceeding £20, four such votes; exceeding £20, five such votes (*s*).

Vacancies.

1336. The proceedings of a board of conservators are not vitiated by reason of any vacancy or defect in the qualification of any member or members of the board (*t*). Casual vacancies may be filled up by the board (*a*).

SUB-SECT. 3.—*Finance.*

Funds of boards of conservators.

1337. The funds of a board of conservators are derived from licence duties, indorsements on licences for movable nets or fishing devices, penalties imposed for breaking the fishery Acts or bye-laws made thereunder, and voluntary contribution (*b*). The money so obtained may be expended by the board in any manner that is legal and, in their opinion, most conducive to the improvement of the salmon fisheries in their district (*c*).

For the purpose of defraying the costs, charges, and expenses incurred or to be incurred under the Salmon Fishery Acts, 1861 and 1865, with the consent of the Board of Agriculture and Fisheries, the conservators may borrow on the credit of the licence duties authorised to be imposed by them or of any property belonging to them, and may mortgage the same for repayment of the sum borrowed (*d*), and ss. 75—88 of the Commissioners Clauses Act, 1847 (*e*), apply to such mortgages.

(*q*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), ss. 29, 30.
(*r*) *Ibid.*, s. 30 (3).
(*s*) *Ibid.*, s. 30 (8). There are many matters of detail as to filling up the voting papers, forwarding them to the returning officer, *i.e.*, the chairman of the board of conservators, or any person appointed by him for the purpose (*ibid.* s. 4), and as to his duties and expenses, which need not be set out at length (*ibid.*, ss. 30 (4)—(7), (9), (15), 31, 32, 33).
(*t*) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 25.
(*a*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 30 (16).
(*b*) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), ss. 33, 34, 62; Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), ss. 21 (4), 62; Salmon Fisheries Act, 1876 (39 & 40 Vict. c. 19), s. 4; Freshwater Fisheries Act, 1884 (47 & 48 Vict. c. 11), s. 1 (2). A county or borough council may contribute to the expenses of salmon conservators incurred in exercise of their powers under the Sea Fisheries Regulation Act, 1888 (51 & 52 Vict. c. 54); see Fisheries Act, 1891 (54 & 55 Vict. c. 37), s. 10.
(*c*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 23.
(*d*) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 28.
(*e*) 10 & 11 Vict. c. 16.

SUB-SECT. 4.—*Powers of Boards of Conservators.*

SECT. 5. **Boards of Conservators etc.**

1338. A board of salmon conservators have within their district the following powers :—

Powers of boards of conservators.

1. To appoint, by writing under the hand of the acting chairman, a sufficient number of water bailiffs and other officers, to assign to them their salaries and duties, and to remove them; to obtain the assistance of additional constables under the County Police Act, 1840 (*f*), and to pay for their services (*g*); and to appoint in writing a person or persons to enter upon any land to inspect any weir, dam, fishing weir, fishing mill dam, fixed engine, obstruction, mill race, or watercourse (*h*).

Appointment of bailiffs.

Issue of licences.

2. To issue licences in a form approved by the Board of Agriculture and Fisheries to persons using a rod and line for fishing for salmon, trout, or char, and in respect of fishing weirs, fishing mill dams, putts, putchers, nets, or other instruments or devices whereby salmon, trout, or char are caught (*i*): with the approval of the Board of Agriculture and Fisheries, to determine from time to time the licence duties leviable in their district, and to vary the same, and to vary the licence duties leviable on similar instruments in different parts of the district (*k*).

Removal of obstructions.

3. To purchase, by agreement, dams, fishing weirs, fishing mill dams, or fixed engines for removal for the benefit of the fisheries in their district (*l*), and, under the directions of the Board of Agriculture and Fisheries, to alter a fish pass or free gap which, in their opinion, is capable of improvement, or to make a new fish pass or free gap in another site. This work has to be done at the cost of the board of conservators (*m*). If a board of conservators are of opinion that certain artificial obstructions which hinder the passage of fish are prejudicial to the salmon fisheries in their district, and they are unable to acquire them, the board may be granted a provisional order empowering them to put in force the powers of the Lands Clauses Consolidation Acts with respect to the purchase and taking of land otherwise than by agreement (*n*). With respect to dams existing at the passing of the Salmon Fishery Act, 1861, a board of conservators may, with the consent of the Board of Agriculture and Fisheries, attach a fish pass to the dam, provided no injury be done to the milling power or to the supply of water in or of any navigable river, canal, or other inland navigation (*o*). If they are unable to do this they may petition the Board

(*f*) 3 & 4 Vict. c. 88, s. 9. For a short treatment of the provisions of this Act, see title POLICE.

(*g*) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 27 (1).

(*h*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 56.

(*i*) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), ss. 27 (2), 33, 34 (7); Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 7.

(*k*) As to amount of licence duties, see p. 614 *post*.

(*l*) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 27 (3).

(*m*) *Ibid.*, s. 32.

(*n*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 49. As to procedure under the Lands Clauses Consolidation Acts, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 1.

(*o*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 23; Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 53.

SECT. 5. Boards of Conservators etc.

of Agriculture and Fisheries to be allowed to purchase so much of the bank adjoining the dam as may be necessary for a fish pass, and a provisional order may be made for this purpose (*p*). Besides these powers to accelerate the passage of fish a board of conservators have certain powers to place gratings at the mouths of certain watercourses (natural or artificial) where, if salmon were allowed to go, they might be destroyed (*q*).

Making bye-laws.

4. For the better execution of the Salmon Fishery Acts, 1861—1873, and for the further protection, preservation, and improvement of the salmon fisheries in their district, to make bye-laws and alter the same from time to time for all or any of the following purposes (*a*) :—

To vary close time.

(1) To alter the commencement and termination of the annual close time as to the whole or part of their district, but the close season for rod and line must not commence later than 1st December, nor be less than ninety-two days, and the close season for other modes of fishing, except putts and putchers (*b*), must not commence later than 1st November nor be less than one hundred and fifty-four days (*c*).

(2) Similarly, with regard to the weekly close season, an alteration must not be made by which it commences before six o'clock on Friday afternoon, or terminates earlier than midnight on the Sunday following, or continues later than noon on the Monday following, or in any case exceeds forty-eight hours (*d*).

(3) To alter the close season for trout and char, but so that when altered it shall not commence earlier than 2nd September, nor later than 2nd November, and shall not be less than one hundred and twenty-three days (*e*).

(4) To exempt the whole or any part of their district from the close season for fish, other than salmon, pollan, trout, char, and eels (*f*).

To regulate size of nets.

(5) To determine the length, size, and description of nets and the manner of using the same (not being fixed engines) for taking salmon; but hang and draft nets may always be two hundred yards long (*g*).

(6) To determine the minimum size of the mesh of nets for catching salmon, but the mesh must not be less than

(*p*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), ss. 49, 50.
(*q*) See *ibid.*, ss. 58, 59, 60.
(*a*) *Ibid.*, s. 39.
(*b*) Salmon Fishery Law Amendment Act, 1879 (42 & 43 Vict. c. 26), s. 2.
(*c*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 39 (1).
(*d*) *Ibid.*, s. 39 (2).
(*e*) Salmon Fisheries Act, 1876 (39 & 40 Vict. c. 19), s. 4; Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 10. The statutory close season for these fish is from 2nd October to 1st February; see Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 64, as amended by the Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 18 (7).
(*f*) Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 11 (7) ; Freshwater Fisheries Act, 1886 (49 & 50 Vict. c. 2), s. 1.
(*g*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 39 (3).

$1\frac{1}{2}$ inch from knot to knot or larger than $2\frac{1}{2}$ inches, measured when wet (*h*).

(7) To determine the minimum size of the mesh of nets (other than casting or dip nets used for catching bait, fixed nets for eels or landing nets) for catching fish which live permanently or temporarily in freshwater, exclusive of salmon, but the prescribed mesh shall never be less than 1 inch nor more than 3 inches from knot to knot, measured when wet (*i*).

(8) To determine the length, size, and description of nets (except fixed nets for eels and landing nets) for catching the same class of fish and the manner of using them (*k*).

To prohibit particular instruments.

(9) To prohibit the use of any mode or instrument of fishing (except fixed nets for eels or landing nets) for the same class of fish where such appears to be prejudicial to the fisheries (*l*).

To regulate licences.

(10) To determine the form of licence and the manner in which licences shall be issued. The form of licence for public or common fisheries must differ from that for private fisheries (*m*).

(11) To vary within the limits of the Salmon Fishery Act, 1873, Sched. III., the rate of licence duty in different parts of the district in respect of the length or size of the net used (*n*).

Miscellaneous.

(12) To determine what distinguishing marks, labels, or numbers are to be attached to licensed nets or painted on or affixed to vessels used in fishing (*o*).

(13) To prohibit the use of nets within a certain distance of the mouth of any river, and of the point of confluence of rivers where the fishing is public (*p*).

(14) To determine when it shall be lawful to use a gaff in connection with a rod and line (*q*).

(15) To determine the times of the year when gratings shall be placed across the head or tail race of certain mills or across certain artificial channels (*r*).

(*h*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 39 (4). When there is no bye-law to this effect in force the nets for taking salmon must be 2 inches from knot to knot (Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 10).

(*i*) Freshwater Fisheries Act, 1884 (47 & 48 Vict. c. 11), s. 1 (1) (i).

(*k*) *Ibid.*, s. 1 (1) (ii.). Conservators under this provision can prohibit the use of particular kinds of nets for taking salmon (*Clayton* v. *Peirse*, [1904] 1 K. B. 424).

(*l*) *Ibid.*, s. 1 (1) (iii.).

(*m*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 39 (5). The forms have to be approved by the Board of Agriculture and Fisheries (see Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121) s. 34 (7).

(*n*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 39 (6).

(*o*) *Ibid.*, s. 39 (7). Vessels used for fishing for sea fish, other than salmon, have to be marked under the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), Part IV.

(*p*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 39 (8).

(*q*) *Ibid.*, s. 39 (9).

(*r*) *Ibid.*, s. 39 (10). Certain gratings are not within the purview of such bye-laws (see Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 13; see also Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), ss. 58—61). As to gratings generally, see p. 620, *post*.

SECT. 5. Boards of Conservators etc.

(16) To regulate, but not prohibit, during the annual and weekly close seasons, the use within any river or part thereof under six miles in breadth at low water, where the fishery is public, of nets for fish other than salmon, when such use is prejudicial to the salmon fisheries (*s*).

(17) To prohibit the use in any waters which are non-tidal the use of any net, except a landing net or a net for taking eels between the expiration of the first hour after sunset and the last hour before sunrise (*t*).

Petitioning Board of Agriculture and Fisheries.

5. To petition the Board of Agriculture and Fisheries to reduce or alter the limits of their district (*a*).

Taking legal proceedings.

6. To take legal proceedings against persons violating the provisions of the Salmon Fishery Acts, 1861 and 1865, or either of them, or for removing such weirs or other fixed engines as they may be advised are illegal (*b*).

To act as sea fisheries committee.

7. In certain areas the board of salmon conservators may have all the powers of a local sea fisheries committee (*c*).

Protection of fishery generally.

8. Generally to execute such works, do such acts, and incur such expenses as they may deem expedient for the protection and improvement of the salmon fisheries, the increase of salmon, and the stocking of the waters in their district forthwith (*d*).

Trout and char rivers.

1339. Boards of conservators formed under the Freshwater Fisheries Act, 1878, for fishery districts in trout and char rivers have the powers given to conservators by the Salmon Fishery Acts, 1865 and 1875 (*e*), and the powers given to conservators by the Freshwater Fisheries Acts 1878 and 1884 (*f*).

Waters frequented by freshwater fish.

1340. Boards of conservators formed under the Freshwater Fisheries Act, 1884, for waters frequented by freshwater fish have the powers given to conservators by the Freshwater Fisheries Act, 1878, s. 6, the Salmon Fishery Act, 1876, and the Freshwater Fisheries Act, 1884, s. 1 (*g*).

(*s*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 39 (11); *Pidler* v. *Berry* (1888), 53 J. P. 6; *Wood* v. *Venton* (1890), 54 J. P. 662. Conservators have no power to prohibit the use of nets for fish other than salmon which are not prejudicial to the salmon in tidal waters.

(*t*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 39 (12).

(*a*) *Ibid.*, s. 5.

(*b*) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 27 (4). In the case of offences against the Salmon and Freshwater Fisheries Acts in force in 1891, the prosecution may be taken by any person; see Fisheries Act, 1891 (54 & 55 Vict. c. 37), s. 13, annulling the effect of the decision in *Anderson* v. *Hamlin* (1890), 25 Q. B. D. 221, where a prosecution by a water bailiff who was not authorised by the fishery board to take proceedings was dismissed.

(*c*) Sea Fisheries Regulation Act, 1888 (51 & 52 Vict. c. 54), s. 12. See p. 622, *post*.

(*d*) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 27 (5).

(*e*) Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 6. These powers are contained in ss. 21—23, 25, 27—29, 33—37 of the Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), and ss. 21—25, 34, 35, 39—45, 47, 49, 50, 57—61 of the Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71).

(*f*) Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), ss. 7, 10, 11; Freshwater Fisheries Act, 1884 (47 & 48 Vict. c. 11), s. 1.

(*g*) *Ibid.*, s. 2. For powers conferred by s. 6 of the Freshwater Fisheries Act, 1878, see note (*e*), *supra*.

SECT. 6. Boards of Conservators etc.

SECT. 6.—*Boards of Conservators under the Salmon and Freshwater Fisheries Act*, 1907.

Conservators under Salmon and Freshwater Fisheries Act, 1907.

1341. Any board of conservators created by a provisional order may have applied to them, with or without modifications, all or any of the provisions of the Salmon and Freshwater Fisheries Acts, 1861—1892, or of the Fisheries (Norfolk and Suffolk) Act, 1896 (*h*), with respect to boards of conservators, and may also be empowered to erect and work fixed engines for salmon on the foreshore, and for that purpose to acquire the necessary lands and easements (*i*). The conservators may lease these fixed engines, but the rent or profits therefrom must be applied to the restriction or abolition of the use, in the area, of nets and other obstructions to the passage of salmon (*j*). The provisional order creating the board of conservators may contain provisions for the general regulation of the fisheries within the jurisdiction of the conservators, and these provisions may give them further powers and duties (*k*).

SECT. 7.—*Powers of Water Bailiffs.*

Water bailiffs:

1342. A water bailiff, appointed by the owner of a private fishery, can do all such acts as might be done by any other servant of the owner, and, if authorised by the owner, may demand and seize and take the rod, line, hook, net or other implement for taking or destroying fish of any person found fishing unlawfully in his employer's private fishery (*l*). He can only act on his employer's property, and must before acting make a reasonable demand and use no more force than is necessary (*m*). The bailiff has power without a warrant to arrest any person unlawfully fishing in his employer's private fishery, except when angling in the day time, and to convey the offender before a neighbouring justice of the peace (*n*).

(i.) of private owners;

(ii.) of boards of conservators.

1343. Boards of conservators have power to appoint water bailiffs and to assign to them duties (*o*). Besides the duties thus assigned to water bailiffs, every water bailiff appointed by a board of conservators has various powers conferred upon him by the Salmon and Freshwater Fisheries Acts, 1861 to 1892. He is deemed to

(*h*) 59 & 60 Vict. c. 18.

(*i*) Salmon and Freshwater Fisheries Act, 1907 (7 Edw. 7, c. 15), ss. 2, 8 (3). As to powers and duties of conservators under the Salmon and Freshwater Fisheries Acts, 1861—1892, see pp. 603—606, *ante*. For definition of fixed engine, see p. 609,, *post*. The conservators have no power, apparently, to erect weirs (see Salmon and Freshwater Fisheries Act, 1907 (7 Edw. 7, c. 15), s. 2, and p. 609, *post*).

(*j*) Salmon and Freshwater Fisheries Act, 1907 (7 Edw. 7, c. 15), s. 2 (1) (e) (ii.). The conservators appear to have no power to compel the owners of nets and obstructions to sell to the conservators.

(*k*) *Ibid.*, s. 2 (j).

(*l*) Larceny Act, 1861 (24 & 25 Vict. c. 96), ss. 24, 25. As to meaning of word "angling," see *Barnard* v. *Roberts* (1907), 96 L. T. 648.

(*m*) *Hughes* v. *Buckland* (1846), 15 M. & W. 346.

(*n*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 103. As to arrest without warrant generally, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 300.

(*o*) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 27. See p. 603, *ante*.

SECT. 7. **Powers of Water Bailiffs.**

be a constable, and, on production of the instrument of his appointment (*p*), he has power to examine any weir, dam, fishing weir, fishing mill dam, fixed engine or obstruction, or any artificial watercourse connected with a salmon river, or with waters frequented by freshwater fish. He may stop and search on any salmon river or waters frequented by freshwater fish (*q*) any boat, barge, coracle, or other vessel used in fishing or which he has cause to suspect contains salmon or freshwater fish. He may search and examine all nets, baskets, bags (*r*) or other instruments used in fishing or in carrying fish by persons whom there is reasonable cause to suspect of having possession of fish illegally caught. If in his search he finds any fish, instrument of fishing, or other articles forfeited in pursuance of the Salmon Fishery Acts, 1861—1873, or the Freshwater Fisheries Acts, 1878 and 1884 (*s*), he may seize the same. Under a special order in writing from the board of conservators, signed by the chairman, a water bailiff may at all reasonable times enter, remain upon, and traverse certain lands adjoining or near to a salmon river or water frequented by freshwater fish for the purpose of preventing any breach of the Salmon Fishery Acts, 1861—1873, and the Freshwater Fisheries Acts, 1878 and 1884 (*t*). If the owner of the land resists the bailiff in the performance of his duties under this order, he incurs the same penalty as if resisting a constable (*u*). A water bailiff may also in certain circumstances obtain a search warrant from a justice of the peace to seize all illegal engines or any salmon or freshwater fish illegally taken, and the warrant is valid for one week (*v*). When a water bailiff has good reason to suspect that the Salmon Fishery Acts, 1861—1873, or the Freshwater Fishery Acts, 1878 and 1884, are being contravened or are likely to be contravened on any lands situate on or near the waters under his charge, he may obtain authority from the justice of the peace to enter upon and remain on such land during a period not exceeding twenty-four hours (*w*). After the first hour after sunset and before the last

Powers to examine weirs etc.;

to search fishing vessels;

to seize forfeited articles;

to enter to prevent breach;

to obtain search warrant and to seize illegal engines;

to enter on suspicion of breach;

to apprehend without warrant;

(*p*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 36 (4), (5). See *Barnacott* v. *Passmore* (1887), 19 Q. B. D. 75; *Cowler* v. *Jones* (1890), 54 J. P. 660. He is bound to produce his warrant of appointment and offer it for inspection, but he is not bound to read it out.

(*q*) "Salmon river" defined by Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 3. Freshwater Fisheries Act, 1884 (47 & 48 Vict. c. 11), s. 3.

(*r*) Bags include the pockets of a suspected person (*Taylor* v. *Pritchard*, [1910] 2 K. B. 320).

(*s*) As to forfeited goods, see Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), ss. 8—12, 14, 15, 17, 20, 21, 23; Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), ss. 58, 64; Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), ss. 17, 20; Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 5; Freshwater Fisheries Act, 1884 (47 & 48 Vict. c. 11), s. 3, and p. 619, *post*.

(*t*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 37; Freshwater Fisheries Act, 1884 (47 & 48 Vict. c. 11), s. 3. The order of the chairman remains in force for two months.

(*u*) *Heseltine* v. *Myers* (1894), 58 J. P. 689.

(*v*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 34; Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 9.

(*w*) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 31; Freshwater Fisheries Act, 1884 (47 & 48 Vict. c. 11), s. 3.

SECT. 7. Powers of Water Bailiffs.

hour before sunrise a water bailiff may apprehend without any warrant any person illegally fishing for salmon or freshwater fish or who is found on or near any water with intent illegally to take or kill such fish, or who has in his possession any implement prohibited by the Salmon Fishery Acts, 1861 — 1873, or the Freshwater Fisheries Acts, 1878 and 1884, and deliver him as soon as may be into the custody of a peace officer (*x*).

Power to institute proceedings.

1344. Any water bailiff may institute proceedings for breaches of the Salmon or Freshwater Fisheries Acts without the authority of the conservators (*y*).

SECT. 8.—*Lawful Methods of Fishing for Salmon, Trout, and Char.*

SUB-SECT. 1.—*Salmon.*

Lawful methods of salmon fishing.

1345. Salmon may be lawfully caught by (1) rod and line; (2) fishing weirs, fishing mill dams, and fixed engines certified to be legal or privileged by the Special Commissioners of English Fisheries in 1865 (*z*), or fixed engines erected by a board of conservators created by the Salmon and Freshwater Fisheries Act, 1907 (*a*); (3) certain movable nets; (4) cross lines (*b*) and such other device or instrument as the Board of Agriculture and Fisheries may sanction (*c*).

Definitions of "weirs," "fishing mill dams," and "fixed engines."

1346. For the purposes of the Salmon and Freshwater Fisheries Acts, some of these terms have been given special meanings.

A fishing weir is any erection, structure, or obstruction fixed to the soil either temporarily or permanently across or partly across a river or branch of a river which is used for the exclusive purpose of catching or of facilitating the catching of fish (*d*).

A fishing mill dam is a dam or other fixed obstruction used or intended to be used partly for the purpose of catching or facilitating the catching of fish, and partly for the purpose of supplying water for milling or other purposes (*e*).

A fixed engine includes (1) a stake net, bag net, putt, putcher, and all fixed implements or engines for catching or for facilitating the catching of fish (*f*); (2) any net or other implement for taking fish

(*x*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 38; Freshwater Fisheries Act, 1884 (47 & 48 Vict. c. 11), s. 3. As to such implements, see p. 619, *post*.

(*y*) See Fisheries Act, 1891 (54 & 55 Vict. c. 37), s. 13; and *Pollock* v. *Moses* (1894), 70 L. T. 378, overruling *Anderson* v. *Hamlin* (1890), 25 Q. B. D. 221.

(*z*) As to such Commissioners, see p. 593, *ante*.

(*a*) As to such boards, see p. 607, *ante*.

(*b*) See Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), ss. 10, 11, 12; Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), Sched. III.; and Salmon and Freshwater Fisheries Act, 1907 (7 Edw. 7, c. 15), s. 2.

(*c*) Compare Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), Sched. III.

(*d*) *Ibid.*, s. 4.

(*e*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 4. A dam built solely for milling purposes, and without any contrivance for catching fish, is not a fishing mill dam although it does, in fact, make it easier to catch fish than would have been the case if there had been no dam (*Garnett* v. *Backhouse* (1868), L. R. 3 Q. B. 30; and see *Moulton* v. *Wilby* (1863), 8 L. T. 284).

(*f*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 4.

SECT. 8. Lawful Methods of Fishing for Salmon etc.

fixed to the soil or made stationary in any way, not being a fishing weir or fishing mill dam (*g*); (3) a net secured by anchors or otherwise temporarily fixed to the soil (*h*); (4) any net placed or suspended in any waters unattended by the owner (*i*) or any person duly authorised by the owner to use the same for catching salmon, and all engines, devices, machines, or contrivances, whether floating or otherwise, for placing or suspending such nets or maintaining them in working order or making them stationary (*k*).

Rules as to fishing weirs.

1347. Every fishing weir which extends more than half way across a stream at its lowest state of water must, unless otherwise authorised by the Board of Agriculture and Fisheries, have a free gap or opening at the deepest part of the stream. This gap must have a width equal to one-tenth of the width of the stream, but it need not be more than forty feet and must not be less than three feet wide in any case. Its sides must be in a line with, and parallel to, the direction of the stream at the weir, and its bottom level with the natural bed of the stream (*l*). Free gaps had to be made in weirs by 1st October, 1862, and have to be maintained under a penalty not exceeding £1 a day. No alteration may be made in the bed of the river so as to reduce the flow of water through the gap, and nothing may be done to prevent or deter fish from freely entering or passing up and down the free gap at all times of the year. A temporary bridge or board may, however, be used to cross the gap if it be taken away immediately when a person has crossed (*m*). Fishing weirs whereby salmon are caught may not be used unless a licence is taken out in respect of them (*n*), and during the close season they must not be allowed to catch salmon (*o*).

Rules as to fishing mill dam.

1348. A fishing mill dam lawfully in existence on the 6th August, 1861, cannot be used for catching salmon unless it has attached thereto a fish pass of such form and dimensions as were approved by the supervising authority, now the Board of Agriculture and Fisheries. This pass must have constantly running through it such a flow of water as will enable salmon to pass up and down (*p*). When a pass has been attached to a fishing mill dam any form of fishing

(*g*) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 39.

(*h*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 11. A net fixed to a pole temporarily fixed in the soil, half the net being stretched across the channel from a boat anchored to a buoy, the fisherman in the boat watching his opportunity to let out the rest of the net and row round to the pole, is a fixed engine (*Olding* v. *Wild* (1866), 14 L. T. 402). So, too, is a stop-net worked over the side of a boat which is fixed in position by two poles driven into the river (*Gore* v. *English Fisheries Commissioners* (1871), L. R. 6 Q. B. 561).

(*i*) Possession of the fixed engine is good *primâ facie* evidence of ownership (*Vance* v. *Frost* (1894), 58 J. P. 398).

(*k*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 4.

(*l*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 27. As to meaning of "stream," see *Rolle* v. *Whyte* (1868), L. R. 3 Q. B. 286.

(*m*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 28.

(*n*) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), ss. 33, 36; Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 22; see also *Lyne* v. *Leonard* (1868), L. R. 3 Q. B. 156.

(*o*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 17.

(*p*) *Ibid.*, s. 12.

is permitted in its proximity unless the owner has been compensated by the board of conservators. In that event no fishing, except by rod and line, may be carried on within fifty yards above or a hundred yards below the fishing mill dam (*q*). A fish pass must not be altered or injured, nor may anything be done to render it less efficient or whereby fish are in any wise liable to be scared, hindered, or prevented from passing through (*r*). A licence must be taken out before a fishing mill dam can be used for fishing (*s*). During the annual close seasons the inscales, hecks, tops and rails of the cruives, boxes or cribs, and all planks and temporary fixtures used for taking or killing salmon, and all other obstructions to the free passage of fish in or through the cruives, cribs and boxes, must be removed from the waters of the fishery (*t*), and the sluices must be opened (*u*). During the weekly close time an opening not less than four feet in width, from the bottom to the top, must be maintained through all the cribs, boxes or cruives (*v*).

Rules as to fixed engines.

1349. No fixed engine, except those declared to be privileged by the Special Commissioners of English Fisheries (*a*), or erected under the provisions of the Salmon and Freshwater Fisheries Act, 1907(*b*), may be used at all (*c*). Privileged fixed engines must not be used within fifty yards above or one hundred yards below any weir or dam or artificial obstruction to the passage of salmon, nor in any waters under or appurtenant to any mill, nor in the head race, tail race, waste race, or pool communicating with the mill race, nor in any artificial channel connected with the weir or obstruction, unless the weir, dam, or artificial obstruction has a fish pass for which the owner has not been compensated (*d*). A licence is required to use fixed engines, and they must not be used during the close season or weekly close time (*e*) except putts and putchers, to which special provisions apply (*f*).

(*q*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 17.

(*r*) *Ibid.*, s. 48.

(*s*) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), ss. 33, 36, 37; Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 22.

(*t*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 20. The mode of construction of boxes and cribs, and spur walls to fishing weirs and fishing mill dams is defined in *ibid.*, ss. 29, 30. When a fishing mill dam has ceased to be used for fishing purposes and all appliances for fishing removed, it ceases to be a fishing mill dam, and the provisions of s. 20 do not apply (*Rossiter* v. *Pike* (1878), 4 Q. B. D. 24). As to annual close seasons, see p. 614, *post*.

(*u*) *Hodgson* v. *Little* (1863), 14 C. B. (N. S.) 111; *Pike* v. *Rossiter* (1877), 37 L. T. 635.

(*v*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 22. As to weekly close seasons, see p. 616, *post*.

(*a*) As to such Commissioners, see p. 593, *ante*.

(*b*) 7 Edw. 7, c. 15; see p. 599, *ante*.

(*c*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 11; Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 41. Illegal fixed engines may be taken and destroyed by anyone (*Williams* v. *Blackwall* (1863), 2 H. & C. 33).

(*d*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 12; Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 17.

(*e*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), ss. 20, 21.

(*f*) Salmon Fishery Law Amendment Act, 1879 (42 & 43 Vict. c. 26), s. 2. See note (*n*), p. 615, *post*.

SECT. 8. Lawful Methods of Fishing for Salmon etc.

Rules as to nets.

1350. Subject to taking out a licence and the observance of the close seasons, and to the provisions as to fishing near weirs stated above with regard to fixed engines, and to any special bye-laws made by the board of conservators, movable nets may be used in fishing provided that they have a mesh of at least two inches from knot to knot, measured when wet, and that no artifice is used to reduce the size of the mesh, as, for instance, canvas, or the placing of two nets side by side (*g*). In the case of draft and seine nets which are worked more than three-quarters of the way across a river, they must not be shot within one hundred yards of any other seine or draft which is being worked in a similar manner (*h*).

Rules as to rod fishing.

1351. Other than regulations as to taking out licences, the only provisions that apply to fishing by rod and line (*i*) are that it shall not be carried on during the annual close time (*k*) : that the line must never be baited with fish roe (*l*) nor used in conjunction with an otter lath or jack, strokehall or snatch (*m*), and that a gaff must not be used in connection with it during such times as may be determined by any bye-law of a board of conservators (*n*).

SUB-SECT. 2.—*Freshwater Fish other than Salmon.*

Method of catching freshwater fish other than salmon.

1352. Apart from any special provision as to times of use of certain fishing implements, trout and char may be captured by any means other than by means of a light, otter jack, wire or snare, spear, gaff, strokehall, snatch, or other like instrument, or by fish roe (*o*), or by any net or other mode or instrument prohibited by a bye-law of a board of conservators (*p*), or by dynamite or other explosives. With regard to coarse fish, the only illegal methods of capture are by dynamite or other explosives, or by any net or other mode or instrument prohibited by a bye-law of a board of conservators (*q*), or by fish roe (*r*).

(*g*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 10; *Dodd* v. *Armor* (1867), 31 J. P. 773.

(*h*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 14.

(*i*) Rod and line means single rod and line (*ibid.*, s. 4).

(*k*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 17.

(*l*) *Ibid.*, s. 9 (1).

(*m*) See p. 619, *post.*

(*n*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 39 (9).

(*o*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), ss. 8, 9; Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 64 ; Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 18 (1), (7); Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 5.

(*p*) Freshwater Fisheries Act, 1884 (47 & 48 Vict. c. 11), s. 1 ; Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 39 (8), (9), (11).

(*q*) Fisheries (Dynamite) Act, 1877 (40 & 41 Vict. c. 65), s. 2; Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 12; Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 39 (8), (9), (11); Freshwater Fisheries Act, 1884 (47 & 48 Vict. c. 11), s. 1.

(*r*) The Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 9, prohibits the use of fish roe for the purpose of fishing, and the Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 5, extends this provision to all waters within the limits of that Act.

SECT. 9. Licences of Conservators.

SECT. 9.—*Licences of Conservators.*

Licences of boards of conservators.

1353. Boards of conservators may issue licences for salmon, trout, or char, in respect of each weir, hang, baulk, garth, goryd, box, crib or cruive, draft or hang or coracle net, putt, outrigger or leader to putts and putchers, cross line, single rod and line, and for any other device or instrument that the Board of Agriculture and Fisheries may sanction (*s*). After a time appointed by the conservators no person may fish for these fish without a licence proper to the instrument he uses (*t*).

General and special licences.

1354. The licences issued are either general or special. A general licence can be issued only to a person entitled to an exclusive right of fishing for salmon, trout or char. It enables the licensee, or anyone authorised by him in writing under his hand, to fish in any legal manner within his fishery (*a*). Special licences are for particular modes of fishing, and must be issued to anyone who tenders the amount of the licence duty; such a licence confers on the licensee no right to fish in any place at which the licensee is not otherwise entitled to fish. If granted for public or common fisheries, it is not available for private fisheries; and, if granted in respect of private fisheries, it is not available in public or common fisheries, except it be a rod and line licence (*b*).

Licences for fishing weirs and engines.

1355. Licences for fishing weirs, fishing mill dams, and fixed engines are to be used only by the person to whom they are granted. Those for movable nets and fishing devices may be used only by the person to whom they are granted, or by his agents or servants, in respect of the instrument for which they were granted. To constitute a person a servant or agent for this purpose, it is necessary that his name be indorsed on the licence by the licensee, or his authorised agent, or by the clerk or other person authorised by the conservators: the licence must not be indorsed with the names of more than twice the number of persons who are required to work the net at one time (*c*).

Licences for rod fishing.

1356. A licence for rod and line may be used only by the person to whom it is granted, and is for the use of a single rod and line (*d*).

(*s*) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), ss. 27 (2), 33; Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), Sched. III.; Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 7.

(*t*) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), ss. 34 (8), 35, 36; Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 22. A person fishing with rod and line for bait with no intention of catching prohibited fish does not require a licence (*Marshall* v. *Richardson* (1889), 58 L. J. (M. C.) 45).

(*a*) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 34 (4).

(*b*) *Ibid.*, s. 34 (5); Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 21 (2).

(*c*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 21 (3) (4); *Lewis* v. *Arthur* (1871), 24 L. T. 66 (licensee not in every case compelled to be present at the net). Putts, being fixed engines, must be licensed even when fitted so as not to catch salmon (*Lyne* v. *Leonard* (1868), L. R. 3 Q. B. 156); so, too, must all nets which are calculated to catch salmon (*Short* v. *Bastard* (1881), 46 J. P. 580); and see *Hill* v. *George* (1880), 44 J. P. 424, and *Davies* v. *Evans* (1902), 86 L. T. 419 (lines for eels but capable of catching salmon or trout).

(*d*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 21 (5); *Cambridge* v.

SECT. 9. Licences of Conservators.

1357. Licences are available only during the fishing season of the year for which they are granted, and only for the fishery district and the time specified on the licence (*e*). Salmon licences are available for trout and char (*f*).

Duration of licences.

Production of licences.

1358. A licence-holder must produce his licence to another licensee on his producing his licence, to a conservator on his producing his certificate of conservancy, to a water bailiff on his producing his appointment, or to any constable if authorised by the justices in quarter sessions to demand production of licences (*g*).

Payment for licences.

1359. The amount payable for licences is determined from time to time by the conservators, but it must not exceed the sums mentioned in the Salmon Fishery Act, 1873, unless the Board of Agriculture and Fisheries has sanctioned a 25 per cent. additional duty for permanent improvements for facilitating the passage of salmon (*h*). The amount payable for a licence to fish for trout or char, exclusively of salmon, must not exceed one third of the maximum amount chargeable for salmon (*i*).

SECT. 10.—*Close Seasons.*

SUB-SECT. 1.—*Annual Close Season.*

Annual close season.

1360. For the protection of fish Parliament has imposed prohibitions on their capture during certain seasons of the year. These seasons are known as the annual and weekly close seasons. Power has also been given to boards of conservators to prohibit by bye-laws the use in inland waters of nets, other than a landing net or a net for eels, between the first hour after sunset and the last hour before sunrise (*k*).

For salmon.

1361. From the 1st September to the 1st November salmon may be caught only by rod and line (*l*). From the 2nd November

Harrison (1895), 64 L. J. (M. C.) 175 (using three rods and three lines at one and the same time under one licence). The rod and line licence does not include night lines (*Williams* v. *Long* (1893), 57 J. P. 217).

(*e*) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 34 (6); Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 7 (day, week, or season tickets for trout and char).

(*f*) Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 7.

(*g*) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 37.

(*h*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), ss. 21 (1), 24, 57. The maximum scale is: "For each and every weir, hang, baulk, garth, goryd, box, crib, or cruive, £12; draft or hang net, not exceeding 200 yards in length, measured along the head-rope when wet, £5; ditto, exceeding 200 yards, for every additional 40 yards or part thereof, £1; coracle net, £2 5*s.*; putt, 3*s.* 6*d.*; outrigger or leader to putts and putchers, not exceeding 100 yards in length, £2; ditto, exceeding 100 yards, for every additional 20 yards or part thereof, £1; cross line, £2 10*s.*; single rod and line, £1 10*s.* For putchers or putts, if not exceeding 50 in number, £1 10*s.* 6*d.*; for every additional 50 or part thereof, £1 10*s.* 6*d.* For any instrument or device not named above, such sum as may be determined by the board of conservators with the sanction of the Board of Agriculture and Fisheries" (*ibid.*, Sched. III.).

(*i*) Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 7 (2).

(*k*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 39 (12).

(*l*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 17.

SECT. 10. Close Seasons.

to the 1st February following, both inclusive, salmon may not be captured (*m*). From the 2nd February to the 1st May salmon may be caught by any lawful method except putts and putchers (*n*). If the fishery is subject to the control of a board of conservators the annual close season may be varied as to the whole or part of the fishery by bye-law. If varied, the season must not commence later than the 1st November for all modes of fishing except putts and putchers and rod and line, and must be of at least one hundred and fifty-four days' duration; as regards fishing with rod and line, the season must commence not later than the 1st December, and must last for at least ninety-two days (*o*). It would seem that the board of conservators have no power to vary the close seasons for putts and putchers (*p*). Within thirty-six hours after the commencement of the close season the proprietor or occupier of a salmon fishery must remove from the waters within his fishery the inscales, hecks, tops and rails of all cruives, cribs or boxes, and all planks and temporary fixtures used for taking and killing salmon, and all other obstructions to the free passage of fish in or through the cruives, cribs or boxes (*q*). It is an offence to place any obstruction, use any contrivance, or do any act for the purpose of deterring salmon from passing up a river, but lawful methods of fishing for fish other than salmon may be used (*r*).

Variation.

Removal of obstructions.

1362. The annual close season for trout and char is from the 2nd October to the 1st February following, both inclusive, during which season trout may not be taken by any method of fishing, except for purposes of artificial propagation or other purposes with the written consent of the conservators of the district (*s*). Boards of conservators may by bye-law alter the commencement of this season to a date between the 2nd September and the 2nd November, but it must continue if altered for one hundred and twenty-three days (*a*).

For trout and char.

1363. Between the 15th March and the 15th June, both inclusive, it is unlawful to fish in any river, lake, tributary, stream, or other water connected with or in communication with such river, for any kind of fish (other than pollan, trout, char and eels) which live in fresh water, except those kinds which migrate to

For other fish.

(*m*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 17.

(*n*) Salmon Fishery Law Amendment Act, 1879 (42 & 43 Vict. c. 26), s 2. These engines may not be used between the end of August and 2nd May following.

(*o*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 39 (1).

(*p*) See Salmon Fishery Law Amendment Act, 1879 (42 & 43 Vict. c. 26), s. 2; and *Prosser* v. *Cadogan* (1906), 94 L. T. 777.

(*q*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 20. This includes the opening of sluices in a fishing mill dam where it is necessary to facilitate the passage of salmon (*Hodgson* v. *Little* (1863), 14 C. B. (N. S.) 111).

(*r*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 16. Boards of conservators have power to regulate the use of nets for fish other than salmon during close seasons (*ibid.*, s. 39 (11)); see also p. 606, *ante*.

(*s*) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 64; Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 18 (7).

(*a*) Salmon Fishery Act, 1876 (39 & 40 Vict. c. 19), s. 4; Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 10.

SECT. 10. Close Seasons.

or from the open sea, unless the fishing takes place under the following circumstances:—

1. In a private or several fishery (1) the owner, when trout, char, or grayling are specially preserved, may destroy freshwater fish other than grayling, but the occupier of the fishery may not do this; (2) any person, with the leave of the owner of the fishery, may angle or take fish for scientific purposes or for use as bait.

2. In a public fishery, with the leave of the board of conservators, anyone may angle, and, except where prohibited by a bye-law of a board of conservators, anyone may take freshwater fish for scientific purposes or for use as bait (*b*). Boards of conservators appointed under the Salmon Fishery Acts, 1861—1876, and under the Freshwater Fisheries Act, 1878, may exempt the whole or any part of their district from the operations of the above provisions as to the close season for freshwater fish (*c*).

Sale during close season.

1364. During their close season freshwater fish other than eels may not be sold, nor exposed for sale, even though caught outside the kingdom (*d*).

Eels.

1365. In a salmon river, eels or the young of eels may not be caught by baskets, nets, traps, or devices between the 1st January and the 24th June inclusive, except in eel baskets not exceeding 10 inches in diameter and constructed so as to be fished with bait, and not used at any dam or weir (*e*). From the 15th March to the 15th June, both inclusive, angling for eels is illegal (*f*).

Lamperns.

1366. Lamperns may not be captured by wheels or leaps placed upon the apron of any weir in a salmon river except between the 1st August and the 1st March (*g*).

SUB-SECT. 2.—*Weekly Close Season.*

Weekly close season.

1367. During the part of the year when the provisions as to the weekly close season are in force, salmon may be caught only by rod and line between noon on Saturday and six o'clock

(*b*) Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 11 (1), (2), (3); Freshwater Fisheries Act, 1884 (47 & 48 Vict. c. 11), s. 5. The occupier may not fish except by leave of the owners, and cannot grant a licence to another person to fish (see *Swanwick* v. *Varney* (1881), 45 L. T. 716). The provision as to fishing for freshwater fish in public fisheries is limited to a few localities, because public fisheries can only exist within the flow and reflow of the tide. The provisions as to the prohibition by bye-laws would seem to be inoperative, as conservators do not appear to have any power to make such bye-laws. *Quære* whether these provisions as to freshwater fish apply to all fresh waters or only to such waters as are subject to the jurisdiction of conservators of fishery districts for salmon and conservators for fishery districts for trout and char rivers

(*c*) Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 11 (7).

(*d*) *Ibid.*, s. 11 (4); Freshwater Fisheries Act, 1886 (49 & 50 Vict. c. 2), s. 1; *Price* v. *Bradley* (1885), 16 Q. B. D. 148.

(*e*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 15. It is an offence to raise floodgates so as to bring an eel trap into action (*Briggs* v. *Swanwick* (1883), 10 Q. B. D. 510). Special provisions apply to the river Severn fishery district see Elver Fishing Act, 1876 (39 & 40 Vict. c. 34)).

(*f*) Freshwater Fisheries Act, 1886 (49 & 50 Vict, c. 2), s. 1.

(*g*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 15

on Monday morning, or by means of putts and putchers at week-ends between the 2nd May and the 31st August (*h*). Boards of conservators may by bye-law vary the commencement and termination of the weekly close season as to the whole or part of their district, so that it does not commence before 6 p.m. on Friday and terminate earlier than midnight on the Sunday following, nor continue later than noon on the following Monday, but in no case may it exceed forty-eight hours (*i*). During the weekly close seasons the proprietor or occupier of a fishery must maintain a clear opening of not less than 4 feet in width from the bottom to the top, through all salmon cribs, boxes or cruives, so that a free space of that width is effectually secured for the passage of fish up and down through each box, crib or cruive, whether used for fishing or not, and he must remove all the inscales and rails (*k*). Throughout Sundays, and at all times when the water is not required for milling purposes, the sluices for drawing off water, which would otherwise flow over any dam, must be kept shut in such a manner as to cause the water to flow through the fish pass, if any, or over the dam (*l*).

There is no weekly close season for fish other than salmon.

SECT. 11.—*Sale and Export.*

SUB-SECT. 1.—*Sale.*

Sale of salmon.

1368. Between the 3rd September and the 1st February following, both inclusive, no person may buy, sell, or expose for sale, or have in his possession for sale, any salmon or part of any salmon. This provision does not apply—(1) to salmon which has been cured, salted, pickled or dried beyond the limits of the United Kingdom, or to salmon so treated in the United Kingdom between the 1st February and the 3rd November; (2) to clean fresh salmon caught within the limits of the Salmon Fishery Act, 1873, by any net, instrument, or device other than a rod and line lawfully in use at the time and in the place of capture; (3) to clean fresh salmon caught at any time beyond the limits of the Salmon Fishery Act, 1873, provided that its capture by any net, instrument, or device other than a rod and line, if within the United Kingdom, was lawful at the time and in the place where it was caught. Proof of the exceptions to the general rule as to sale lies on the vendor (*m*).

Sale of trout or char.

1369. It is an offence to buy, sell, or expose for sale, or have in possession for sale, trout or char between the 2nd October

(*h*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 21; Salmon Fishery Law Amendment Act, 1879 (42 & 43 Vict. c. 26), s. 2. It is an offence to fish for salmon with any other means even though none are caught (*Ruther* v. *Harris* (1876), 1 Ex. D. 97); see also *Davies* v. *Evans* (1902), 86 L. T. 419.

(*i*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 39 (2).

(*k*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 22. No provision is made as to the height of the clear opening, and it is submitted that a height sufficient to allow salmon to pass would be sufficient.

(*l*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 26; Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 53.

(*m*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 19.

SECT. 11. Sale and Export.

and the 1st February following, both inclusive (*n*). This provision applies equally to fish caught without or within England and Wales, even though their capture may be lawful (*o*).

Sale of freshwater fish generally.

1370. Between the 15th March and the 15th June, and irrespectively of the place of capture, no one may buy, sell, or expose for sale, or have in his possession for sale, any freshwater fish except those kinds which migrate to or from the open sea, and except pollan, trout, char and eels (*p*).

SUB-SECT. 2.—*Export.*

Export of salmon.

1371. The export of unclean and unseasonable salmon from any part of the United Kingdom is forbidden at all times (*q*). Salmon caught during the time at which the sale of salmon is prohibited in the district where it was caught may not be exported from any part of the United Kingdom (*r*). All salmon intended to be exported from England and Wales to places outside the United Kingdom must be entered with the proper officer of customs before shipment at the port or place of intended exportation (*s*). Before the 3rd September and the 30th April following any officer of customs may open any parcel he suspects of containing salmon, and may detain the salmon until proof is given that the exportation of such salmon is legal. If before such proof is given the salmon becomes unfit for human food, the officer may destroy it. If the salmon was not entered with the proper officer it is liable to be forfeited, and the shipper and exporter is liable to a penalty not exceeding £2 for every salmon so shipped or exported (*t*).

SECT. 12.—*Protection of Fisheries.*

SUB-SECT. 1.—*Dynamite and other Explosives.*

Use of explosives.

1372. Dynamite and other explosive substances may not be used to catch or destroy fish in any public fishery in the United Kingdom (*a*), or in any private fishery in England and Wales (*b*). This provision as to public fisheries does not apply beyond one marine league from the coast (*c*).

SUB-SECT. 2.—*Pollution.*

Pollution.

1373. No one may knowingly permit liquid or solid matter to flow into any waters containing salmon, or into any tributaries thereof, to such an extent as to poison or kill fish, except in the exercise of

(*n*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 20.
(*o*) *Price* v. *Bradley* (1885), 16 Q. B. D. 148.
(*p*) Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 11 (4); Freshwater Fisheries Act, 1886 (49 & 50 Vict. c. 2), s. 1; *Price* v. *Bradley*, *supra*.
(*q*) Salmon Acts Amendment Act, 1863 (26 & 27 Vict. c. 10), s. 3.
(*r*) *Ibid.*
(*s*) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 65.
(*t*) *Ibid.*; Salmon Acts Amendment Act, 1870 (33 & 34 Vict. c. 33), s. 4.
(*a*) Fisheries (Dynamite) Act, 1877 (40 & 41 Vict. c. 65), s. 2; see also title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 768, 785.
(*b*) Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 12; Freshwater Fisheries Act, 1884 (47 & 48 Vict. c. 11), s. 8.
(*c*) Fisheries (Dynamite) Act, 1877 (40 & 41 Vict. c. 65), s. 3.

a lawful right and after the trial of the best practical means within a reasonable cost to render such effluent matter harmless (*d*). The question as to whether the best means within a reasonable cost have been tried may be determined by a jury (*e*).

It is a misdemeanour punishable by penal servitude (not exceeding seven years) unlawfully and maliciously to put any lime or other noxious material into any pond or water in which there is a private right of fishing, or into any salmon river, with intent to destroy the fish then there, or that may thereafter be put therein (*f*).

A person who puts poison, lime, or any noxious material into any waters frequented by fish living permanently or temporarily in fresh water, exclusive of salmon, may, instead of being indicted for a misdemeanour, be prosecuted summarily under the Summary Jurisdiction Acts (*g*).

SUB-SECT. 3.—*Illegal Fishing* (*h*).

Unclean salmon.

1374. No one may wilfully take, kill, injure or attempt to take, unclean or unseasonable salmon, or wilfully take or destroy or injure the young of salmon, unless for the purpose of artificial propagation or other scientific purposes, and then, if he is within a district where a board of conservators is established, only if he has first obtained their consent (*i*). If an unclean or unseasonable salmon is accidentally caught an offence is not committed if it be returned to the water with the least possible injury (*j*).

Unlawful fishing implements.

1375. No one may use for the purpose of catching, or have in his possession under such circumstances as to satisfy the court before whom he is tried that he intended at the time to catch or kill by means thereof, salmon, trout, or char (*k*), any light, otter lath or jack (*l*), wire or snare, spear, gaff, except as auxiliary to a rod and

(*d*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 5.

(*e*) *Ibid.*, ss. 6, 7.

(*f*) Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 32; Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 13; *R.* v. *Vasey*, [1905] 2 K. B. 748, C. C. R.; see also title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 785.

(*g*) Freshwater Fisheries Act, 1884 (47 & 48 Vict. c. 11), ss. 6, 7. The subject of pollution of water in general is further dealt with under titles NUISANCE; PUBLIC HEALTH AND LOCAL ADMINISTRATION; WATERS AND WATERCOURSES. As to procedure on such prosecutions, see title MAGISTRATES.

(*h*) As to property in fish caught and larceny, see p. 589, *ante*.

(*i*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), ss. 14, 15; Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 60. A person who, while fishing for trout, catches samlets and keeps them not knowing the difference and having no intention to catch samlets, commits no offence against these provisions (*Hopton* v. *Thirwall* (1863), 9 L. T. 327).

(*j*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 14.

(*k*) *Ibid.*, s. 8; Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 64; Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 18 (7); Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 5; Freshwater Fisheries Act, 1884 (47 & 48 Vict. c. 11), s. 8.

(*l*) "Otter lath or jack" means and includes any small boat or vessel, board, or stick used for the purpose of running out baits, artificial or otherwise, across any portion of a lake or river, and whether used with a hand line or as auxiliary to a rod and line or in any other way. "Strokehall" or "snatch" means and includes any instrument or device, whether used with a rod and line or otherwise,

SECT. 12. Protection of Fisheries.

line, strokehall, snatch, or other like instrument (*m*). In a fishery district where licences are required no one may use an unlicensed fishing weir, fishing mill dam, fixed engine, instrument, net or device, except a gaff or landing net as auxiliary to a rod licence, for catching or for facilitating the catching of salmon, trout or char, or assist any person in so doing (*n*).

Sale or use of roe.

1376. The roe of any sort of fish may not be used for the purpose of fishing in a salmon river, or in waters within the limits of the Freshwater Fisheries Act, 1873, and nobody may ever sell or expose for sale any roe of salmon, trout, or char. A person found using or having in his possession any such roe must prove that he had the roe for artificial propagation or other scientific purposes with the written consent of the board of conservators for the district, or give a reason satisfactory to the court by whom he is tried for having the same in his possession (*a*).

SUB-SECT. 4.—*Spawning Beds.*

Spawning beds.

1377. The spawning beds or banks or shallows in which the spawn of salmon may be must not be wilfully disturbed except by an owner legally taking materials from a stream (*b*). When salmon are spawning or when on or near their spawning beds they must not be wilfully disturbed or attempted to be caught except for the purposes of artificial propagation or other scientific purposes, and even then if there be a board of conservators for the water their written consent is necessary (*c*).

SUB-SECT. 5.—*Gratings.*

Gratings.

1378. A grating is a device approved by the Board of Agriculture and Fisheries for preventing the passage of fish through any channel (*d*). In certain circumstances a board of conservators may place gratings for preventing the ingress of salmon into streams in which salmon or their spawning beds are from the nature of the channel liable to be destroyed (*e*). Persons having the control of artificial channels in existence in 1861 for supplying towns or a navigable canal with water, whereby salmon or the young of salmon are led aside out of a main stream, must maintain gratings across

for the purpose of foul hooking any fish (Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 4).

(*m*) A fishing net with an illegally small mesh is not a like "instrument" (*Jones* v. *Davies*, [1898] 1 Q. B. 405).

(*n*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 22. A person may pick up a dead fish without holding a licence (*Gazard* v. *Cooke* (1890), 55 J. P. 102), but not a dying fish (*Stead* v. *Tillotson* (1900), 69 L. J. (Q. B.) 240). As to larceny of living and dead fish, see p. 589, *ante*.

(*a*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 9, as amended by Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), ss. 60, 64; Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 18 (7); Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 5; Freshwater Fisheries Act, 1884 (47 & 48 Vict. c. 11), s. 8. As to offences under the Larceny Act, 1861, property in fish, and poaching, see p. 589, *ante*.

(*b*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 15.

(*c*) *Ibid.*, s. 16; Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 60.

(*d*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 4.

(*e*) *Ibid.*, s. 60.

such channels for the purpose of preventing the descent of these fish, provided the gratings do not interfere with navigation (*f*). In certain other channels a board of conservators may erect gratings, and the adjoining landowner or occupier is then bound to take reasonable means to prevent the gratings from being injured or removed (*g*).

Part VI.—Statutory Enactments relating to Salt Water Fisheries and Sea Fishing.

SECT. 1.—*Supervision of Sea Fisheries.*

SUB-SECT. 1.—*By Board of Trade.*

Supervision by Board of Trade.

1379. The general supervision and control of the sea fisheries is divided between the Board of Trade and the Board of Agriculture and Fisheries (*h*).

SUB-SECT. 2.—*Board of Agriculture and Fisheries.*

Powers of Board of Agriculture and Fisheries;

1380. The Board of Agriculture and Fisheries has had transferred to it all the powers which the Board of Trade had under various statutes for the regulations of Sea Fisheries (*i*).

to create sea fisheries districts;

Under these Acts the Board has power to create sea fisheries districts within the territorial waters of England and Wales, and to provide for the constitution of local fisheries committees by whom the sea fisheries carried on within such districts are to be regulated. This includes power to unite or dissolve districts (*k*).

to confirm bye-laws;

The Board also has power to make regulations as to the making of bye-laws by the local fisheries committee (*l*), and may confirm a bye-law either with or without holding a local inquiry or with or without such modifications as may be assented to

(*f*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 13.

(*g*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), ss. 58, 61.

(*h*) Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31), s. 1. The Board of Trade is intrusted with the administration of the Merchant Shipping Acts, 1854—1906; the Sea Fisheries Act, 1843 (6 & 7 Vict. c. 79); the Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), except Part III.; the Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22); the Fisheries Act, 1891 (54 & 55 Vict. c. 37), Part I.; and the North Sea Fisheries Act, 1893 (56 & 57 Vict. c. 17). As to Board of Trade, see title CONSTITUTIONAL LAW, Vol. VII., p. 102. As to offences against the Behring Sea Award Act, 1894 (57 & 58 Vict. c. 2), see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 279, 285, 561; see also p 637, *post*.

(*i*) Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31), s. 1. The statutes are:—The Sea Fisheries Regulation Act, 1888 (51 & 52 Vict. c. 54); the Fisheries Act, 1891 (54 & 55 Vict. c. 37), Part II.; the Sea Fisheries (Shell Fish) Regulation Act, 1894 (57 & 58 Vict. c. 26); the Roach River Oyster Fishery Act, 1866 (29 & 30 Vict. c. cxlv.); the Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), Part III.; the Oyster and Mussel Fisheries Orders Confirmation Act, 1869 (No. 2) (32 & 33 Vict. c. 31); the Sea Fisheries Act, 1875 (38 & 39 Vict. c. 15); the Fisheries (Oyster, Crab, and Lobster) Act, 1877 (40 & 41 Vict. c. 42); and the Sea Fisheries Act, 1884 (47 & 48 Vict. c. 27).

(*k*) Sea Fisheries Regulation Act, 1888 (51 & 52 Vict. c. 54), ss. 1, 11, 12.

(*l*) *Ibid.*, s. 2. Regulations were made by the Board of Trade on 9th November, 1897 (Statutory Rules and Orders, 1899).

SECT. 1. Supervision of Sea Fisheries.

by the local fisheries committee (*m*). Once a bye-law is confirmed, the Board has no power to repeal it. The Board may call upon a local fisheries committee to collect statistics relating to sea fisheries and make returns as to the proceedings of the committee (*n*).

to regulate oyster fisheries;

The Board have power, after certain statutory provisions have been complied with, to make an order for the establishment or improvement or for the maintenance and regulation of an oyster, mussel, or cockle fishery (*o*). Such an order comes into force when confirmed by Parliament, or in special circumstances when confirmed by Order in Council (*p*). The Board may by certificate in certain events determine such order either as to the entire fishery or as to any part thereof (*q*).

Where any local or personal Act passed since 1863 subjected any oyster fishery company to the control of the inspectors of fisheries appointed under the Salmon Fishery Act, 1861 (*r*), this control is now exercised by the Board (*s*). The Board also have power in certain cases to sanction or prohibit the removal of oysters from a public oyster bed or bank (*t*), and can also sanction any expenses which local fisheries committees may incur in stocking or restocking any public fishery for shell-fish (*u*).

to regulate lobster and crab fishing.

After a public inquiry the Board may by order restrict or prohibit, under such conditions as they define, the fishing for and taking of edible crabs or lobsters in a defined area of the public fishery in the sea, and may make the necessary provisions for enforcing such order (*v*). These orders may be repealed or amended by a bye-law of a local sea fisheries committee (*w*).

SECT. 2.—*Powers of Sea Fisheries Committees.*

Sea fisheries committees.

1381. Subject to the provisions of the order constituting a local fisheries committee, the law relating to committees and joint committees of county councils applies in like manner as if the powers and duties of the local fisheries committees were powers and duties transferred by the Local Government Act, 1888 (*x*), to the council or councils represented on the committee and delegated to the committee by the said council or councils, and as if any borough council represented in the committee were a county council (*a*).

(*m*) Sea Fisheries Regulation Act, 1888 (51 & 52 Vict. c. 54), s. 4.
(*n*) *Ibid.*, s. 8.
(*o*) Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), ss. 29, 40, 44; Sea Fisheries Act, 1884 (47 & 48 Vict. c. 27), s. 1.
(*p*) Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), s. 37; Fisheries (Oyster, Crab, and Lobster) Act, 1877 (40 & 41 Vict. c. 42), s. 7.
(*q*) Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), s. 45; Oyster and Mussel Fisheries Orders Confirmation Act, 1869 (No. 2) (32 & 33 Vict. c. 31), s. 2.
(*r*) 24 & 25 Vict. c. 109.
(*s*) Sea Fisheries Act, 1875 (38 & 39 Vict. c. 15), s. 1; Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31), s. 1, Schedule.
(*t*) Fisheries (Oyster, Crab, and Lobster) Act, 1877 (40 & 41 Vict. c. 42), s. 5.
(*u*) Sea Fisheries (Shell Fish) Regulation Act, 1894 (57 & 58 Vict. c. 26), s. 1 (2).
(*v*) Fisheries (Oyster, Crab, and Lobster) Act, 1877 (40 & 41 Vict. c. 42), s. 10.
(*w*) Sea Fisheries Regulation Act, 1888 (51 & 52 Vict. c. 54), s. 2 (1) (d).
(*x*) 51 & 52 Vict. c. 41.
(*a*) Sea Fisheries Regulation Act, 1888 (51 & 52 Vict. c. 54), s. 1 (3).

SECT. 2. Powers of Sea Fisheries Committees.

1382. Subject to such regulations as may be made by the Board of Agriculture and Fisheries, a local fisheries committee may make bye-laws as to the whole or part of their district and during the whole or part of the year as to the following matters:—

Power to make bye-laws:

1. Restricting or prohibiting, either absolutely or subject to such regulations as may be provided by the bye-laws—(1) any method of fishing for sea fish or the use of any instrument for fishing for sea fish, and for determining the size of mesh, form and dimensions of any instrument for fishing for sea fish; (2) the fishing for or taking of all or any specified kinds of sea fish during any specified period (*b*). — as to fishing for sea fish;

2. Constituting any district of oyster cultivation for the purposes of s. 4 of the Fisheries (Oyster, Crab, and Lobster) Act, 1877 (*c*), and directing that the proviso to s. 8 of that Act shall not apply, and repealing or amending any order made under s. 10 of that Act, or under the Fisheries (Oyster, Crab, and Lobster) Act (1877) Amendment Act, 1884 (*d*). — as to oysters;

3. Regulating, protecting and developing fisheries for all or any specified kinds of shell-fish (including all kinds of molluscs and crustaceans); and any bye-law may provide, among other things—(1) for fixing the sizes at and conditions under which shell-fish may not be removed from a fishery, and the mode of determining such sizes (*e*); (2) for an obligation to re-deposit in specified localities any shell-fish, the removal or possession of which is prohibited, by or in pursuance of an Act of Parliament; (3) for the protection of shell-fish laid down for breeding purposes, and of culch and other material for the reception of spat (*f*), and for an obligation to re-deposit such culch and other material in specified localities (*g*). — shell-fish;

4. Prohibiting or regulating the deposit or discharge of any solid or liquid substance detrimental to sea fish or sea fishing, except discharge of sewage by a sanitary or other local authority in pursuance of parliamentary powers (*h*). — pollution;

5. Repealing or amending any bye-law they have previously made (*i*). — repealing bye-laws;

6. Imposing as penalties for the breach of any bye-law fines not exceeding for any one offence the sum of £20, an additional sum of £10 a day for a continuing offence, and in any case the forfeiture of the fish taken and the fishing instrument used (*j*). — penalties;

(*b*) Sea Fisheries Regulation Act, 1888 (51 & 52 Vict. c. 54), ss. 1 (3), 2; Fisheries Act, 1891 (54 & 55 Vict. c. 37), s. 7. As to definition of "trawl" under such a bye-law, see *Colbeck* v. *Ashfield* (1888), 67 L. J. (Q. B.) 333.

(*c*) 40 & 41 Vict. c. 42.

(*d*) 47 & 48 Vict. c. 26; see Sea Fisheries Regulation Act, 1888 (51 & 52 Vict. c. 54), s. 2 (1) (b), (c), (d).

(*e*) The offence of removal is complete as soon as the shell-fish have been taken up from any part of the fishery with the intention of eventually carrying them away (*Thomson* v. *Burns* (1896), 66 L. J. (Q. B.) 176).

(*f*) Spat is the spawn or young of any kind of shell-fish (Sea Fisheries (Shell Fish) Regulation Act, 1894 (57 & 58 Vict. c. 26), s. 1 (d).

(*g*) Sea Fisheries (Shell Fish) Regulation Act, 1894 (57 & 58 Vict. c. 26), s. 1 (c).

(*h*) Sea Fisheries Regulation Act, 1888 (51 & 52 Vict. c. 54), ss. 2, 13 (c).

(*i*) *Ibid.*, s. 2 (2).

(*j*) *Ibid.*, s. 3.

SECT. 2. **Powers of Sea Fisheries Committees.**

When made the bye-laws must be published as directed by statute (*k*). The bye-laws cannot prejudicially affect any several fishery or any right in, to, or over the seashore in the hands of a subject without his consent, or any bye-laws of a board of salmon conservators (*l*).

Appointment of fishery officers.

1383. Subject to any restrictions or conditions made by the county councils (*m*) appointing to the local fisheries committee as to expenditure, the committee may appoint such fishery officers (*n*) as they deem expedient for the purpose of enforcing the observance of the bye-laws (*o*).

Stocking public fishery.

1384. A local fisheries committee have power to stock or restock any public fishery for shell-fish, and for that purpose to incur such expenses as may be sanctioned by the Board of Agriculture and Fisheries (*p*). The committee have also power to enforce any Act of Parliament relating to sea fisheries (*q*).

Collecting statistics.

1385. Every local fisheries committee are bound to collect such statistics relating to the sea fisheries within their district and make such returns to the Board of Agriculture and Fisheries as that Board may reasonably require. The expenses incurred in obtaining the statistics is borne by moneys provided by Parliament (*r*).

SECT. 3.—*Powers of Fishery Officers appointed by Sea Fisheries Committees.*

Powers of sea fishery officers.

1386. A fishery officer appointed by a local fisheries committee when enforcing any bye-law is deemed to be, and has all the powers and privileges of, a constable; moreover, he is empowered, within his district, or in any adjoining sea fisheries district, or salmon fishery district, or the district of a harbour authority, to stop and search any vessel or vehicle used within the district in fishing or in conveying either fish or any substance the deposit or discharge of which is prohibited or regulated by a bye-law, and search and examine all instruments used in catching or carrying fish, and seize any sea fish or instrument liable to forfeiture (*s*). He also has power without the authority of the local fisheries committee to take legal proceedings for the enforcement of the Acts relating to sea fisheries or of any bye-law made thereunder (*t*).

(*k*) Sea Fisheries Regulation Act, 1888 (51 & 52 Vict. c. 54), s. 5.

(*l*) *Ibid.*, s. 13 (a), (b).

(*m*) Any restrictions must be made before the officer is appointed (*R.* v. *Plymouth Corporation*, [1896] 1 Q. B. 158). Where more than one council appoints to the committee, the conditions and restrictions can only be imposed by the common agreement of all the councils represented on the committee (*R.* v. *North Riding of Yorkshire County Council*, [1899] 1 Q. B. 201).

(*n*) The officer may be also an officer of a board of salmon conservators (Sea Fisheries Regulation Act, 1888 (51 & 52 Vict. c. 54), s. 6 (5)).

(*o*) *Ibid.*, s. 6 (1).

(*p*) Sea Fisheries (Shell Fish) Regulation Act, 1894 (57 & 58 Vict. c. 26), s. 1 (2).

(*q*) Fisheries Act, 1891 (54 & 55 Vict. c. 37), s. 9.

(*r*) Sea Fisheries Regulation Act, 1888 (51 & 52 Vict. c. 54), s. 8.

(*s*) *Ibid.*, s. 6 (1), (2). As to power to search a person, compare *Taylor* v. *Pritchard*, [1910] 2 K. B. 320.

(*t*) Fisheries Act, 1891 (54 & 55 Vict. c. 37), s. 13; *Pollock* v. *Moses* (1894), 70 L. T. 378.

SECT. 4.—*General Statutory Provisions as to Sea Fisheries* (*u*).

SECT. 4. General Statutory Provisions as to Sea Fisheries.

SUB-SECT. 1.—*Floating Fish.*

Rules as to sea fishing-boats.

1387. A British fishing boat, whether inside or beyond the exclusive fishery limits of England (*a*), must not, between sunset and sunrise, anchor, except in consequence of accidents or of other compulsory circumstances, on grounds where drift net fishing is actually going on (*b*), and nets and other fishing engines must not be set or anchored on such grounds (*c*). Boats arriving in the fishing grounds must not place themselves nor shoot their nets in such a way as to injure each other, or to interfere with fishermen actually fishing at the time. Undecked drift net boats must shoot their nets to windward of decked boats, and decked drift net boats to leeward of undecked boats (*d*). When trawl fishermen are in sight of drift net or long line fishermen they must take all necessary steps in order to avoid doing injury to the latter (*e*).

Fouling lines.

1388. When the nets or lines of fishermen get foul of each other, they may be cut only in certain circumstances (*f*), and all necessary measures for reducing to a minimum the injuries which may result to the gear or boat of the other fishermen must always be taken (*g*).

Powers of local committee.

1389. A local sea fisheries committee have certain powers by bye-laws to regulate the methods of fishing for sea fish within the exclusive fishery limits within their districts (*h*).

Seine fishing

On the coast of Cornwall, except so much of the north coast as lies to the east of Trevose Head, no one between the 25th July and

(*u*) Besides the statutes relating to sea fisheries generally, there are the following Acts relating to particular localities: Blackwater (Essex), 31 & 32 Vict. c. ix.; Boston Deeps, 33 & 34 Vict. c. vi., 2 Edw. 7, c. lxxviii.; Colne, 33 & 34 Vict. c. lxxxv.; Bosham and Chichester, 36 & 37 Vict. c. lxii.; Emsworth, 33 & 34 Vict. c. vi., 34 & 35 Vict. c. cxlv.; Falmouth, 40 & 41 Vict. c. cxxvi.; Faversham, 3 & 4 Vict. c. lix.; Hamble, 31 & 32 Vict. c. ix.; Hamford Water, 46 & 47 Vict. c. x.; Herne Bay, 27 & 28 Vict. c. cclxxx., 28 & 29 Vict. c. clxviii.; Hunstanton Le Strange, 46 & 47 Vict. c. x.; Ipswich, 22 & 23 Vict. c. lxxii., 30 & 31 Vict. c. xlvi.; Langston and Chichester Harbour, Oyster and Mussel Fisheries Orders Confirmation Act, 1869 (No. 2) (32 & 33 Vict. c. 31); Lynn Deeps, 35 & 36 Vict. c. i., 43 & 44 Vict. c. cxlii., 6 Edw. 7, c. cxii.; Medway, 2 Geo. 2, c. 19, 30 Geo. 2, c. 21; Medway Regulation Continuance Act, 1868 (31 & 32 Vict. c. 53); Menai Straits, 37 & 38 Vict. c. xviii.; Paglesham, 37 & 38 Vict. c. xviii.; Poole, 48 & 49 Vict. c. xii., 50 & 51 Vict. c. c.; Queenborough, 8 & 9 Vict. c. cxliv.; Ramsholt, 47 & 48 Vict. c. xiii.; Roach River, 29 & 30 Vict. c. cxlv.; Rochester, 28 & 29 Vict. c. ccxxvii., 30 & 31 Vict. c. lxxii.; Salcombe, 35 & 36 Vict. c. lxiii.; St. Ives Bay, 4 & 5 Vict. c. lvii.; Swansea, 34 & 35 Vict. c. cxlv., 46 & 47 Vict. c. x.; Tees, 7 Edw. 7, c. lxxviii.; Tollesbury and Mersea, 42 & 43 Vict. c. i.; Truro, 39 & 40 Vict. c. xci.; Whitstable, 33 Geo. 3, c. 42, 59 & 60 Vict. c. xli.; Seine fishing on coasts of Somerset, Devon and Cornwall, 1 Jac. 1, c. 23.

(*a*) For the definition of these limits, see p. 633, *post*.

(*b*) Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22), s. 4, Sched. I., art. 14.

(*c*) *Ibid.*, art. 17.

(*d*) *Ibid.*, arts. 15, 16.

(*e*) *Ibid.*, art. 19.

(*f*) *Ibid.*, arts. 19, 20, 21, 22.

(*g*) Fisheries Act, 1891 (54 & 55 Vict. c. 37), s. 4, Schedule, art. 4.

(*h*) Sea Fisheries Regulation Act, 1888 (51 & 52 Vict. c. 54), s. 2.

SECT. 4. General Statutory Provisions as to Sea Fisheries.

the 25th November may, between sunrise and sunset, use a drift net or trawl within two miles of the coast, or, within half a mile of any sea fishing boat stationed for seine fishing, anchor a boat other than a seine boat, or lay, set, or use any net, boulter, or implement of sea fishing except for the purpose of seine fishing. The penalty for a breach of this provision is a fine not exceeding £20 (*i*).

Trawling in prohibited areas.

1390. Fish caught by trawling in areas in which trawl-fishing is prohibited in Scotland or Ireland may not be landed nor sold in the United Kingdom, but so far as Ireland is concerned this prohibition only applies to fish caught in steam trawlers (*j*).

SUB-SECT. 2.—*Shell-fish.*

Ownership of oysters, mussels, and cockles.

1391. All oysters, mussels, and cockles in or on an oyster, mussel or cockle bed in a several oyster, mussel or cockle fishery granted by an order of the Board of Agriculture and Fisheries, and oysters in or on any private oyster bed which is sufficiently marked out and known as such, are the absolute property of the grantees of the order or of the owner of the private oyster bed; and if such oysters, mussels or cockles be removed from either of these beds, and not sold in market overt nor disposed of under the authority of the grantee or owner, they still continue to be their absolute property. In the case of theft from contiguous beds or fisheries, it is necessary only to prove that they were the property of, and in the lawful possession of, one or other of the proprietors, and were stolen from one or other of such contiguous beds or fisheries (*k*).

Protection of beds.

1392. Within the limits of a several oyster, mussel, and cockle fishery, or of a private oyster bed, no person without the authority of the grantees or owner may (1) use any implement of fishing except a line and hook or a net adapted solely for catching floating fish, and so used as not to disturb nor injure the oysters or mussels; (2) dredge for ballast or other substance, except under lawful authority for improving the navigation; (3) deposit rubbish, ballast, or other substance; (4) place anything prejudicial or likely to be prejudicial to the oysters or mussels, except for the lawful purpose of navigation or of anchorage; (5) disturb or injure in any manner the oysters or mussels, except for a lawful purpose of navigation or of anchorage (*l*).

Sale of deep-sea oysters.

1393. Deep-sea oysters may not be sold nor consigned for sale between the 15th June and the 4th August, nor any other description of oysters between the 14th May and the 4th August. This

(*i*) Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), s. 68.

(*j*) Trawling in Prohibited Areas Prevention Act, 1909 (9 Edw. 7, c. 8), ss. 1, 6. As to what places may be prohibited areas, see *ibid.*, ss. 5, 6.

(*k*) Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), ss. 51, 52, 55. These sections were extended to include cockles in a cockle fishery granted by the Board of Agriculture and Fisheries (Sea Fisheries Act, 1884 (47 & 48 Vict. c. 27)). It was held in *Truro Corporation* v. *Rowe*, [1902] 2 K. B. 709, C. A., that a person who deposited oysters on a portion of the foreshore in a public fishery has no property in them; but *quære* this decision, see judgment of FLETCHER MOULTON, L.J., in *Foster* v. *Warblington Urban Council*, [1906] 1 K. B. 648, C. A.

(*l*) Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), s. 53. As to the rights of navigation in relation to fisheries, see p. 591, *ante*.

provision does not apply to oysters taken within the waters of some foreign State, though they be afterwards laid down and stored in English waters where they do not breed, nor to oysters taken from certain other places with the sanction of the Board of Agriculture and Fisheries, nor to oysters preserved in tins or otherwise cured, or intended for the purpose of oyster cultivation within the same district in which they were taken (*m*).

Oyster dredging outside territorial waters.

1394. Outside the territorial waters lying between a line drawn from the North Foreland to Dunkirk and from the Land's End to Ushant fishing for oysters is prohibited between the 16th June and the 31st August, and in these waters during that time boats may not have on board any oyster dredge unless it be tied up and sealed by the Customs (*n*), and no person may fish for oysters or have on board his boat any oyster dredge within any seas, and during any time within and during which oyster fishing is prohibited by law or by any convention, treaty, or arrangement to which the Sea Fisheries Act, 1883, may be applied (*o*).

SUB-SECT. 3.—*Lobsters and Crabs.*

Sale of lobsters and crabs.

1395. It is illegal to take, have possession of, or sell or expose or consign for sale, or buy for sale, any edible crab which is less than 4 inches across the broadest part of the back, or which has spawn attached to it or has recently cast its shell, unless it was intended for use as bait for fishing and there is no local bye-law forbidding such use (*p*).

No one may take, possess, sell, or expose or consign for sale, or buy for sale, any lobster which measures less than 8 inches from the top of the beak to the end of the tail when spread as far as possible flat (*q*).

Penalties.

1396. The penalty for a breach of these provisions is a fine not exceeding £2 for the first offence, £10 for the second or any subsequent offence, and the forfeiture of all the crabs or lobsters found in the possession of the offender at the time (*r*).

SECT. 5.—*Protection of Sea Fisheries.*

SUB-SECT. 1.—*Dynamite and other Explosives.*

Use of explosives in sea fishery.

1397. The use of dynamite and other explosive substances to catch or destroy fish in a public fishery within one marine league of the coast is punishable by a fine not exceeding £20, or, at the

(*m*) Fisheries (Oyster, Crab, and Lobster) Act, 1877 (40 & 41 Vict. c. 42), s. 4; *Robertson* v. *Johnson*, [1893] 1 Q. B. 129 (French oysters).

(*n*) Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), s. 12, Schedule, art. 11.

(*o*) Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22), s. 4 (c).

(*p*) Fisheries (Oyster, Crab, and Lobster) Act, 1877 (40 & 41 Vict. c. 42), s. 8; Sea Fisheries Regulation Act, 1888 (51 & 52 Vict. c. 54), s. 2 (c).

(*q*) Fisheries (Oyster, Crab, and Lobster) Act, 1877 (40 & 41 Vict. c. 42), s. 9. As to powers of local fisheries committees and the Board of Agriculture and Fisheries with respect to these fish, see pp. 623, 624, *ante*.

(*r*) Fisheries (Oyster, Crab, and Lobster) Act, 1877 (40 & 41 Vict. c. 42), ss. 8, 9.

SECT. 5. Protection of Sea Fisheries.

option of the court, to imprisonment with or without hard labour not exceeding two months (*s*). Private fisheries frequented by salt-water fish do not appear to be legislated for (*s*), except oyster and mussel fisheries created under the Sea Fisheries Act, 1868, and private oyster beds sufficiently marked out or known as such (*t*).

SUB-SECT. 2.—*Pollution.*

Pollution of sea fisheries.

1398. There is no common law right to pollute the sea by discharge of sewage (*u*). It is a statutory offence to put lime or other noxious material maliciously and unlawfully into any water in which there is any private right of property with intent to take or destroy any fish therein (*a*), and knowingly to deposit any ballast, rubbish or other substance, or to place anything prejudicial or likely to be prejudicial to, except for the purpose of navigation or anchorage, or to disturb or injure in any manner, any oyster or mussel bed created by the Sea Fisheries Act, 1868, or any private oyster bed sufficiently marked out and known as such (*b*).

SUB-SECT. 3.—*Instruments for Destroying Fish and Fishing Gear.*

Fishing implements for sea fishing.

1399. There are no limitations as to the nature of fishing implements that may be used to catch fish, except such as may be contained in the bye-laws of a local sea fisheries committee, but no person belonging to a British sea fishing boat may use any instrument for the purpose of damaging or destroying by cutting or otherwise any fishing implement belonging to a sea fishing boat, except in certain events (*c*) ; and no person may manufacture or sell any instrument serving only or intended to damage or destroy fishing implements by cutting or otherwise (*d*).

SECT. 6.—*Statutory Provisions as to Sea Fishing Boats.*

SUB-SECT. 1.—*Registration.*

Registration of sea fishing boats.

1400. Every vessel (*e*), of whatever size and in whatever way propelled, which is employed in sea fishing or in the sea fishing

(*s*) Fisheries (Dynamite) Act, 1877 (40 & 41 Vict. c. 65), ss. 2, 3. These provisions were extended to private fisheries within the limits of the Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 12. It is conceived that that Act cannot apply to salt water; see *Stead* v. *Nicholas*, [1901] 2 K. B. 163, deciding that that Act did not even apply to artificial freshwater reservoirs.

(*t*) Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), s. 53, which forbids the injury of these fisheries in any manner except for the purpose of navigation or anchorage.

(*u*) *Foster* v. *Warblington Urban Council*, [1906] 1 K. B. 648, 665, 689, C. A.; see also *Hobart* v. *Southend-on-Sea Corporation* (1906), 75 L. J. (K. B.) 305, compromised on appeal, 22 T. L. R. 530, C. A.; and *Owen* v. *Faversham Corporation* (1908), 73 J. P. 33, C. A.; *Times*, 24th June.

(*a*) Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 32; see also p. 623, *ante*.

(*b*) Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), s. 53. This subject is further dealt with under titles NUISANCE; WATERS AND WATERCOURSES.

(*c*) These cases are specified in arts. 20 and 21 of the Convention set out in the Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22), Sched. I., and refer to fouling of nets or lines under such circumstances that it is impossible to disengage them by any means other than cutting. The Act, *ibid.*, s. 2, makes these articles of the same force as if enacted in the body of the Act.

(*d*) Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22), ss. 5, 9.

(*e*) For definition of vessel, see titles FERRIES, p. 564, *ante;* SHIPPING AND NAVIGATION.

service, whether used for profit or not, must be entered in the fishing boat register, and must be lettered and numbered and have official papers (*f*). The tonnage of a sea fishing boat for the purpose of the fishing boat register is, if she is already registered under the Merchant Shipping Act, 1894, Part I., her gross or register tonnage. If she is not so registered, the tonnage is ascertained on the same method as is employed for registration under Part I. of that Act (*g*).

SUB-SECT. 2.—*Equipment.*

Equipment of sea fishing boats.

1401. Besides the lights and fog signalling apparatus that other vessels of her class have to carry, every decked fishing boat must carry the boats according to her tonnage set out in the Merchant Shipping Act, 1894, Sched. XV., and if she carries more than ten passengers she must have two life-buoys and a life-boat or a boat rendered buoyant after the manner of a life-boat (*h*). The life buoys and boat must be kept at all times fit and ready for use.

SUB-SECT. 3.—*Certificates of Skippers and Second Hands of Trawlers.*

Skippers of sea fishing boats.

1402. Trawlers of twenty-five tons tonnage and upwards may not go to sea from any port in the United Kingdom unless the skipper and second hand are duly certificated. A superintendent of the Board of Trade may authorise the trawler to go to sea in charge of the second hand if he is satisfied that the master's absence is due to an unavoidable cause (*i*).

The Board of Trade is empowered to grant certificates of competency as skipper or second hand of fishing boats, or any particular class of fishing boats, in the same manner as certificates of competency are granted to masters and mates of ordinary merchant vessels, and the holders of such certificates are entitled to such privileges and subject to such liabilities as if they held certificates of masters or mates respectively (*j*). A skipper's certificate of competency is not granted unless the person has held a certificate as second hand for at least twelve months (*k*).

Certificates.

In certain circumstances the Board of Trade may grant certificates of service instead of certificates of competency (*l*). The Board keeps a register of certificated skippers and second hands which is admissible in evidence (*m*).

(*f*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 370, 373. There is power by Order in Council under s. 373 to exempt vessels from these provisions. The register is conclusive evidence of ownership (*ibid.*, s. 374), in case of offences against the Sea Fisheries Act, 1868 (31 & 32 Vict. c. 97), and the Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22), and for recovery of damages for injury to the boat.

(*g*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 371.

(*h*) *Ibid.*, s. 375; see, further, title SHIPPING AND NAVIGATION.

(*i*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 413; Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 81. Rules as to conduct of examinations and the qualification of applicants for certificates of competency as second hand or skipper have been made by the Board of Trade, see Statutory Rules and Orders, 1900, No. 806; 1901, No. 309.

(*j*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 414; Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 81; see also title SHIPPING AND NAVIGATION.

(*k*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 414 (2); Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 81.

(*l*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 415; Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 81.

(*m*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 416; Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 81. This register began in 1883.

SECT. 6. SUB-SECT. 4.—*Indentures of Apprenticeship and Agreements with Sea Fishing Boys.*

Statutory Provisions as to Sea Fishing Boats.

1403. The following provisions apply to all fishing boats of twenty-five tons tonnage and upwards.

Apprentices to sea fishing.

A boy under thirteen years of age cannot be apprenticed nor enter into an agreement with respect to the sea fishing service, but any boy under sixteen years of age may be daily employed by oral agreement provided he is not bound to remain employed for more than one day (*n*). Boys from thirteen to sixteen years of age may not be employed for more than one day unless they enter into agreements to serve as sea fishing boys or become indentured apprentices to the sea fishing service (*o*). Indentures of apprenticeship and written agreements with boys under sixteen years of age must be made before a superintendent of the Board of Trade and be in the form authorised by Order in Council (*p*). Before such documents are completed the superintendent must satisfy himself (1) that all the statutory requirements have been fulfilled; (2) that the master with whom the indenture or agreement is made is a fit person for the purpose; (3) that the boy is not under the age of thirteen years and is of sufficient strength and health; and (4) that the nearest relations or guardians assent: when there are no nearest relations or guardians, or when they cannot readily be found or are not known, the superintendent may act as guardian for the occasion (*q*). The stipulations in these documents may be enforced against the master by the superintendent for the time being of the port at which the documents were executed (*r*).

It is a misdemeanour to pay or receive money or receive value in consideration of the apprentice or boy being so bound (*s*).

SUB-SECT. 5.—*Engagement and Discharge of Crew.*

Engagement and discharge of crew.

1404. The crew of a sea fishing boat may be, but are not compelled to be, engaged or discharged before a superintendent of the Board of Trade (*a*), and, except in cases of certain trawlers, there is no special statutory provision requiring their engagement or discharge to be evidenced by writing.

Agreement with crew.

In the case of screw steam trawlers of twenty-five tons tonnage or upwards and sailing trawlers of fifty tons tonnage and upwards, the skipper or owner must enter into an agreement with every seaman whom he carries to sea as one of his crew from any part of England or Ireland (*b*). The form of agreement has to be approved by

(*n*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 392, 393 (4).
(*o*) *Ibid.*, s. 393.
(*p*) *Ibid.*, s. 395 (1), (5). For forms of apprenticeship and agreements with boys, see Encyclopædia of Forms and Precedents, Vol. II., pp. 49 *et seq.*
(*q*) *Ibid.*, s. 395 (1), (2), (3).
(*r*) *Ibid.*, ss. 396, 397.
(*s*) *Ibid.*, s. 398. As to the penalty, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 558.
(*a*) *Ibid.*, s. 390.
(*b*) *Ibid.*, s. 399. The Board of Trade have exempted paddle steam trawlers and sailing trawlers under fifty tons from the requirements of ss. 399—408 relating to the engagement of seamen (Statutory Rules and Orders, 1899, No. 805). It would seem that in the case of the engagement of a fisherman in Scotland no

the Board of Trade, and must contain as terms thereof: (1) the nature, and as far as practicable the duration, of the engagement; (2) the number and description of crew; (3) the time at which each seaman is to be on board or to commence work; (4) the capacity in which each seaman is to serve; (5) his remuneration; (6) the scale of provisions to be furnished; (7) any regulations as to conduct and as to fines and punishments which the Board of Trade have approved and the parties agree to adopt; (8) any other stipulation not contrary to law that the parties may adopt (*c*).

Term of service.

The agreement may be for service either in a particular boat or in two or more boats belonging to the same owner, and may, if the voyages average less than six months, be made to extend over two or more voyages or any number of weeks, but such agreements do not extend beyond the following 30th June or 31st December or the first arrival of the boat at her port of destination in the United Kingdom after that date (*d*).

The agreement has to be read over to the crew before they sign, and is executed in duplicate, one part being delivered to the superintendent (*e*). When entered into it must not be altered in any way except by the consent of all parties interested (*f*).

Wages of crew.

1405. The wages of a skipper, seaman, or apprentice accrue from day to day. When contracted for by the voyage, or trip, or the season, or by the share, the amount accruing from day to day is computed to be an amount equal to the wages for the whole of the voyage, or trip, or season, or the whole share divided by the number of days occupied in the voyage, or trip, or season, but no one is entitled to more than what his share of the profits or catch made during the period he has actually served may amount to, or would have amounted to (*g*). Except when dispensed with by the wage earners, the owner must give to the skipper, and the skipper to each seaman, an account in a form approved by the Board of Trade of the wages (not being a share in the catch), and of all deductions to be made therefrom. This account must be delivered at least four hours before the paying off or discharge of the skipper or seamen respectively (*h*).

Payment of crew by share of catch.

When the skipper or crew are paid by a share in the catch the owner must render a full and true account in a form approved by the Board of Trade, showing in detail the amount for which the fish have been sold, and all deductions which are chargeable to the men who are paid by share; and if there is a dispute the owner must

agreement is necessary, but if an agreement whereby the fisherman is to be remunerated wholly by a share in the profits of the voyage is entered into it must be made before a superintendent (Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 389).

(*c*) *Ibid.*, s. 400.

(*d*) *Ibid.*, ss. 402, 403. Such agreements are known as "running agreements."

(*e*) *Ibid.*, s. 401.

(*f*) *Ibid.*, s. 407. Where the column in the agreement as to the amount of salvage a crew should be entitled to was added after the crew signed, the agreement in that respect was held void (*The Saltburn* (1894), 7 Asp. M. L. C. 474).

(*g*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 383.

(*h*) *Ibid.*, s. 409.

SECT. 6. **Statutory Provisions as to Sea Fishing Boats.**

give inspection of his accounts and books relating to the catch (*i*). Any party to a dispute as to his share in the profits, or as to his engagement, service, or discharge, or as to the cost, quantity, or quality of provisions supplied, may call upon a superintendent to determine such dispute. The decision of the superintendent is final, and may be enforced by any justice of the peace having jurisdiction in such matters, as if such decision were an order made by a court of summary jurisdiction, and any sum adjudged due may be recovered as if it were wages (*k*).

Certificate of discharge of seamen.

1406. Upon the discharge of a seaman from a trawler of twenty-five tons tonnage and upwards, or on the payment of his wages, the skipper must sign and deliver to each seaman a certificate of discharge, in a form approved by the Board of Trade, specifying the period of service and time and place of discharge (*l*). If a seaman is discharged without his fault or consent before the termination of his engagement he is entitled to recover, in addition to an amount of wages proportionate to the time he has served, compensation for the damage caused him, and can recover it as wages duly earned (*m*).

SUB-SECT. 6.—*Discipline.*

Offences by (i.) seamen and apprentices; (ii.) skipper; (iii.) boys.

1407. The seamen and apprentices of any fishing boat may be punished in various ways for the offence of desertion, absence without leave, wrongfully quitting the boat, wilful disobedience, continued breach of duty, assault on the skipper or second hand, unlawful combination, wilful damage, or smuggling. A skipper is liable to punishment as if he were a seaman for the offences of desertion, absence without leave, wrongfully quitting the boat, wilful damage and smuggling, and the punishments as to the offences of wilful disobedience, continued breach of duty, assault, and unlawful combination apply to apprentices and sea fishing boys, whether on shore or on board (*n*).

Desertion.

A seaman or an apprentice who deserts, or is absent without leave, or refuses or neglects to join his boat, may be taken before a superintendent or principal Board of Trade officer or his deputy, and if he gives no sufficient explanation must be ordered to join his boat, and if he refuses to obey the officer

(*i*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 388.

(*k*) *Ibid.*, s. 387. The superintendent's decision, on the request of any party, is to be put in writing, and when signed by him is admissible in evidence (*ibid.*, s. 387 (2)). When a fisherman is a seaman within the meaning of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 742, he has the same rights for the recovery of his wages as any other merchant seaman; see title SHIPPING AND NAVIGATION.

(*l*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 410. Two years' service evidenced by discharges from a decked fishing boat and one year's service in a trading vessel entitle a man to be rated A.B. on a merchant ship (*ibid.*, s. 126; Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 58 (1)).

(*m*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 411.

(*n*) *Ibid.*, s. 376. A sea fishing boy is a boy over thirteen and under sixteen years of age who is bound by an agreement made under Part IV. of this Act (see p. 630, *ante*). A seaman can be convicted of the offence of wilful disobedience, although the act of disobedience amounted to desertion or absence without leave (*Edgill* v. *Alward* (*J. & G.*), *Ltd.*, [1902] 2 K. B. 239).

he may be brought before a court of summary jurisdiction (*o*) for punishment (*p*).

Assault and other like offences.

1408. When afloat no person on board, or belonging to, a British sea fishing boat may discharge or present any firearm, or discharge or throw anything at any other sea fishing boat, or use threatening, abusive or obscene language to, or attack, intimidate, or molest any person on board another sea fishing boat, or do any act likely to provoke a breach of the peace (*q*).

SUB-SECT. 7.—*Deaths, Injuries, and Casualties.*

Casualties on fishing boats.

1409. The skipper of a fishing boat must keep a record of every death, injury, ill-treatment, or punishment of any person on board his boat, and of any casualty happening to his fishing boat or to any boat belonging to her, and must report to the superintendent at the port where his voyage ends. The superintendent has power to inquire into the cause and particulars of any such occurrence, and if it appears to have been caused or accompanied by violence or the use of improper means, he must report the matter to the Board of Trade, and if necessary take immediate steps for bringing the offender to justice (*r*).

Safety of fish carriers.

1410. With a view to protecting fishermen engaged in carrying fish from fleets of trawlers to fish carriers, the Board of Trade may make regulations for preventing loss of life or danger to life or limb, and has done so in certain cases (*s*).

SECT. 7.—*Foreign Fishing Boats in British Waters.*

Foreign boats in British waters.

1411. A foreign sea fishing boat must not enter within the exclusive fishery limits of the British Islands (*t*), except for purposes recognised by international law or by any convention, treaty, or arrangement for the time being in force between this country and any foreign State, or for any lawful purpose. If a foreign sea fishing boat does enter the exclusive fishery limits she must return outside as soon as the purpose for which she entered has been fulfilled. No person on board the boat shall attempt to fish while the boat is within such limits, and all regulations prescribed by Order in Council must be observed (*a*).

(*o*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 380, 381.

(*p*) *Ibid.*, s. 379.

(*q*) Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22), ss. 3, 4; Order in Council, 6th April, 1889 (Statutory Rules and Orders Revised, Vol. VIII., Merchant Shipping, p. 194).

(*r*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 385, 386.

(*s*) *Ibid.*, s. 417. Regulations have been made for the Great Northern Steamship Fishing Co., Ltd., Great Grimsby Ice Co., Ltd., Grimsby and North Sea Steam Trawling Co., Ltd., Hull Steam Fishing and Ice Co., Ltd., Short Blue Fleet, Hagerup Doughty & Co., Kelsall Brothers and Beeching, Hull Steam Fishing Vessel Owners Association, Ltd.

(*t*) *I.e.*, the portion of the seas surrounding the British Islands within which British subjects have by international law the exclusive right of fishing (Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22), s. 28).

(*a*) Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22), s. 7. By Order in Council, 6th April, 1889 (Statutory Rules and Orders Revised, Vol. VIII., Merchant

SECT. 7. Foreign Fishing Boats in British Waters.

1412. If these provisions are broken the person in charge of the boat is liable to a fine of not exceeding £10 for the first offence and £20 for any subsequent offence, and any fish or fishing gear found in the boat or shown to have been taken or used within the exclusive fishery limits is liable to forfeiture (*b*).

Penalties.

French boats.

1413. Every French fishing boat when forced by stress of weather to seek shelter in any port in the British Isles is, so long as she does not discharge or receive on board any cargo, exempt from all dues or other charges (*c*).

Customs regulations.

1414. Every foreign sea fishing boat coming to a port in the British Isles must comply with all the provisions of the Customs Consolidation Act, 1876 (*d*), relating to arrival, bringing to, examination, boarding of officers, protection of stores, report of ship, entry of goods, and clearance outwards, if with any cargo, as if she were a ship (*e*).

SECT. 8.—*Foreign Fishing Boats outside British Waters.*

Foreign boats outside British waters.

1415. The fishing in the sea outside of the territorial waters of this kingdom is regulated in some instances by Conventions with the States interested in the fishing, and enforced, in the case of British vessels, by statute confirming the Conventions. The Conventions at present in force relate to the English Channel, the North Sea, and the seas around Iceland and the Faröe Islands (*f*).

In the seas between England, Ireland, and France.

In the seas between the coasts of England and Ireland and France, French fishing boats must be lettered, numbered, bear distinguishing marks and have official papers, and there are various regulations as to their mode of fishing, the nets to be employed, the conduct of their fishing operations, and the punishment of offenders (*g*).

Shipping, p. 194), it is provided that persons on board of or belonging to foreign sea fishing boats within the exclusive fishery limits (see note (*t*), p. 633, *ante*) must not discharge firearms or throw missiles at any other boat or use threatening or abusive language to, or attack, or molest, or intimidate any person on board another vessel, or do any act likely to provoke a breach of the peace.

(*b*) Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22), s. 7 (2); Fisheries Act, 1891 (54 & 55 Vict. c. 37), s. 5.

(*c*) Order in Council, 7th October, 1869 (Statutory Rules and Orders Revised, Vol. VIII., Merchant Shipping, p. 196), made under Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), s. 66.

(*d*) 39 & 40 Vict. c. 36.

(*e*) Order of Board of Customs, dated 2nd April, 1884, made under powers of the Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), s. 18. As to Customs generally, see title REVENUE.

(*f*) Convention with France, 24th May, 1843 (as to the English Channel); Convention with Germany, Belgium, Denmark, France, Netherlands, 6th May, 1882 (as to the North Sea); Convention with Germany, Belgium, Denmark, Netherlands, 16th November, 1887 (as to the liquor traffic in North Sea); Convention with Denmark, 24th June, 1901 (as to the ocean surrounding the Faröe Islands and Iceland).

(*g*) The regulations in the Convention with France were made to apply equally to English as well as French vessels by the stat. (1843) 6 & 7 Vict. c. 79. By the Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), s. 71, the Act of 1843 was repealed; but by the Fisheries (Oyster, Crab, and Lobster) Act, 1877

SECT. 8. Foreign Fishing Boats outside British Waters.

In the North Sea.

In the North Sea (*h*), Belgian, Danish, Dutch, French, and German fishing boats must be lettered and numbered, have official papers, and obey the same regulations as to the mode of fishing as British vessels (*i*).

The superintendence of this area is carried out by the cruisers of the nations interested. The commanders of these cruisers have power to arrest and take offending vessels into a port of the nation to which the fishermen belong. There are various provisions for the punishment of offenders (*k*).

Offences in North Sea.

1416. In the limits of the North Sea persons on sea fishing boats belonging to Great Britain, Belgium, Denmark, Germany, or Holland are forbidden to purchase or acquire by barter any spirituous liquors from any person, and provisions and other articles for use by persons on board sea fishing boats may not be sold except by persons duly licensed (*l*).

Fishing off Iceland and Faröe Islands.

The fishing in the ocean around the Faröe Islands and Iceland is the subject of a Convention between Great Britain and Denmark (*m*). Within three miles of the islands the fishing belongs exclusively to Danish subjects. Outside this limit, but within a certain prescribed area, the fishermen of the two countries are subject to the same regulations as to registration, lettering, and mode of fishing as are imposed on British vessels by the Sea Fisheries Act, 1883 (*n*).

(40 & 41 Vict. c. 42), s. 15, it was enacted that notwithstanding anything contained in the Sea Fisheries Act, 1868, the Act of 1843, as far as regards French fishermen and French sea fishing boats, was to be in force until the Convention with France of 11th November, 1867, came into force. By the Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22), s. 24, it is provided that in certain conditions the Act of 1843 might be repealed. In July, 1908, the Act of 1843 was still in force as to French subjects outside the three-mile limit. Disputes arising between French subjects under the Act must be settled by the tribunal appointed by the Act, and a claim cannot be brought in the High Court for damages (*Marshall* v. *Nicholls* (1852), 18 Q. B. 882).

(*h*) For the boundaries of the North Sea, see Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22), Sched. I., art. 4.

(*i*) Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22), Sched. I., p. 625, *ante*.

(*k*) *Ibid.*, ss. 4, 5, 15, 22, Sched. I., arts. 27—37.

(*l*) North Sea Fisheries Act, 1893 (56 & 57 Vict. c. 17). This Act is enforced by the same procedure as the Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22). Regulations as to licences and the conditions on which they are granted are prescribed by Order in Council, 28th April, 1894 (Statutory Rules and Orders, 1894, No. 121).

(*m*) Order in Council, 12th March, 1903 (Statutory Rules and Orders, 1903, No. 214).

(*n*) *Ibid.* As to such regulations, see p. 628, *ante*. The limits are on the south a line commencing from where the meridian of North Unst Lighthouse meets the parallel of 61° of north longitude to a point where the 9° meridian of west longitude meets the parallel of 60° north latitude, and from thence westward along that parallel to the meridian of 27° west longitude. On the north by the parallel of 67° 30″ of north latitude, on the east by the meridian of the North Unst Lighthouse. As to registration etc., see p. 628, *ante*.

Part VII.—Whale and Seal Fisheries.

SECT. 1.

SECT. 1.—*Property in Whales etc.*

Property in Whales etc.

Ownership of whales in territorial waters.

1417. All whales taken within the territorial waters of the kingdom belong to the King in right of his Crown except when taken in places where the Crown has granted out its right in this respect, in which case they belong to the grantees of the Crown (*o*). The captors of whales within the limits of the territorial waters do not acquire any property in them.

Ownership of whales in extra-territorial waters.

1418. The law as to the property in whales captured beyond the territorial waters of the kingdom is, in the absence of special customs recognised at the place of capture, the same as that relating to other animals in a wild state (*p*). They belong to the first person engaged in their pursuit so long as he continues the pursuit with a reasonable prospect of success, and other persons, by interfering in the chase, acquire no interest in the carcase.

Customs of the whaling fishery.

1419. Owing to the particular manner in which the whaling industry has to be carried on, conventional rules or local customs have sprung up in particular localities. In the Greenland whale fishery the rule of "fast and loose" applies.

"Fast" fish.

A fish is said to be a "fast" fish—(1) while the harpoon remains in the fish, and the line continues attached to it and remains in the power or management of the striker, or (2) if the fish is so entangled in the line that the striker might probably have secured it without the interference of other persons (*q*). If while the fish is "fast" another harpooner strikes it or, unsolicited, so disturbs it that it breaks from the first harpooner, even though he capture it he obtains no property in it (*r*).

"Loose" fish.

When the fish is a "loose" fish at the moment of striking it will be the property of the person who strikes it and captures it, though, at the time he struck, the fish may have been repeatedly harpooned, but not held on to (*s*). In the Southern whale fishery among the Gallipagos Islands the rule of "fast and loose" does not apply in its entirety, for if, at the time of striking, the fish has been struck by a harpoon attached to a buoy or "droug," the party who first struck the fish with the harpoon and "droug" is entitled to one-half of the proceeds from the party who kills it (*t*).

(*o*) Stat. De Prerogativa Regis (*temp. incert.*), c. 13; see p. 580, *ante*. As to the application of this statute to the waters on the coast beyond the low-water mark, see title WATERS AND WATERCOURSES, and *R.* v. *Keyn* (1876), 2 Ex. D. 63, C. C. R. See, also, title CONSTITUTIONAL LAW, Vol. VII., p. 215. The same law applies to sturgeon captured within the kingdom (*ibid.*).

(*p*) See title ANIMALS, Vol. I., pp. 365 *et seq.*

(*q*) *Aberdeen Arctic Co.* v. *Sutter* (1862), 4 Macq. 355, H. L.; *Hogarth* v. *Jackson* (1827), Mood. & M. 58; *Hutchison* v. *Dundee Whale Fishing Co.* (1830), 5 Murr. 162; *Littledale* v. *Scaith* (1788), 1 Taunt. 243, n.; and see title CUSTOM AND USAGES, Vol. X., p. 283.

(*r*) *Littledale* v. *Scaith*, *supra*; *Skinner* v. *Chapman* (1827), Mood. & M. 59, n.

(*s*) *Littledale* v. *Scaith*, *supra*.

(*t*) *Fennings* v. *Grenville* (*Lord*) (1808), 1 Taunt. 241.

SECT. 1. Property in Whales tc.

1420. The property in seals and large marine fish, except sturgeon captured in British waters is decided according to the law as to the capture of animals in a wild state (*a*).

SECT. 2.—*Statutory Provisions applying to Whale, Seal, and Walrus Fishing Vessels.*

Seals.

Application of Merchant Shipping Act to whalers.

1421. All British vessels (except Scottish vessels whaling off the coast of Scotland) engaged in whale, seal, or walrus fishing are for the purposes of the Merchant Shipping Acts deemed to be foreign-going ships, and not fishing boats (*b*).

Statutory restrictions on sealing.

1422. In the North Pacific Ocean sealing is totally forbidden to British subjects anywhere within sixty miles of the Pribiloff Islands (*c*), and within ten miles of the Russian coast abutting on the Behring Sea and the North Pacific Ocean north of the 42nd parallel of north latitude, and thirty miles round the Kormandorsky Islands and Tulénew (Robben Island) (*d*). Poaching in the above water preserves is a misdemeanour, and renders the ship and everything on board of her liable to forfeiture (*e*).

Between 1st May and 31st July, both inclusive, sealing is forbidden anywhere north of the 35th degree of north latitude, and east of the 180th degree of longitude till it strikes the water boundary described in Article 1 of the Treaty of 1867 between the United States and Russia (*f*), and following that line up to Behring Straits (*g*).

When fur seal fishing is allowed, only sailing vessels with or without the assistance of canoes or undecked boats propelled by paddles, oars, or sails may be engaged in the fishing (*h*). The sailing vessels authorised to fish for seals must have a special licence for the purpose, and must fly a distinguishing flag (*i*). Nets, firearms, and explosives may not be used except shot guns when outside of the Behring Sea (*k*).

(*a*) See title ANIMALS, Vol. I., pp. 365 *et seq.*

(*b*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 744, as amended by Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 83. As to foreign-going ships, see title SHIPPING AND NAVIGATION.

(*c*) Behring Sea Award Act, 1894 (57 & 58 Vict. c. 2), Sched. I., art. 1.

(*d*) Seal Fisheries (North Pacific) Act, 1895 (58 & 59 Vict. c. 21), ss. 1, 7; Order in Council, 21st November, 1895, art. 1 (Statutory Rules and Orders Revised, Vol. IV., Fishery, p. 13).

(*e*) Seal Fisheries (North Pacific) Act, 1895 (58 & 59 Vict. c. 21), s. 1. This Act and the Order in Council made under it contain provisions for enforcing the Act and the due punishment of offenders; and see Behring Sea Award Act, 1894 (57 & 58 Vict. c. 2), s. 1 (2).

(*f*) For the full text of the treaty, see British and Foreign State Papers, Vol. 57, p. 452.

(*g*) Behring Sea Award Act, 1894 (57 & 58 Vict. c. 2), Sched. I., art. 2.

(*h*) *Ibid.*, art. 3.

(*i*) *Ibid.*, art. 4. The distinguishing flag for British vessels is a square flag at least 4 feet square of two equal triangular pieces joined from the right-hand upper corner of the flag to the left-hand lower corner of the luff, the upper triangle black and the lower yellow. This flag must be flown under the Red Ensign (Behring Sea Award Order in Council, 1895, art. 2 (Statutory Rules and Orders Revised, Vol. IV., Fishery, p. 11)); see *ibid.*, schedule, for form of British licence.

(*k*) Behring Sea Award Act, 1894 (57 & 58 Vict. c. 2), Sched. I., art. 6.

SECT. 2. Statutory Provisions applying to Whale etc. Fishing Vessels.

Men engaged in fur seal fishing have, before their engagement, to prove that they are fit to handle with sufficient skill the weapons by means of which the fishing is to be carried on. The masters of the sailing vessels must enter in their official log-book the date and place of each fur sealing operation, and the number and sex of the seals captured each day (*l*).

Close time for seals.

1423. From 1st January to 2nd April in each year a British subject is not allowed to kill nor capture any seal in so much of the seas adjacent to the coast of Greenland as lies between the parallels of 67 degrees and 75 degrees of north latitude and between the meridian of 5 degrees east and 17 degrees west longitude from Greenwich (*m*).

Part VIII.—Jurisdiction of Justices relating to Fishery Offences.

Jurisdiction in fishery offences.

1424. Proceedings against persons contravening any of the provisions of the Salmon and Freshwater Fisheries Acts, 1861—1892, may be instituted before a court of summary jurisdiction (*n*) in any place in which the salmon, trout or char in respect whereof the proceedings are taken may be found (*o*), or in the court of the district in which the offence was committed. If the water in which the offence was committed formed the boundary between counties or districts the case may be prosecuted in either of such counties or districts, or if on the sea coast or at sea beyond the ordinary jurisdiction of the justices of the peace, the case is to be tried in the county abutting on such sea coast or adjoining such sea (*p*).

Jurisdiction in sea fishery offences.

1425. Offences by French subjects against the Sea Fisheries Act, 1843 (*q*), if committed within the three-mile limit, are triable in the county adjacent to the waters in which the offence was committed (*r*). In the case of offences committed beyond the three-mile limit the offender may be taken before a justice at any port into which he is brought. The justice has power only to inquire by all

(*l*) Behring Sea Award Act, 1894 (57 & 58 Vict. c. 2), Sched. I., art. 5. As to offences under the Behring Sea Award Act, 1894 (57 & 58 Vict. c. 2), s. 1 (2), and the Seal Fisheries (North Pacific) Act, 1895 (58 & 59 Vict. c. 21), s. 1 (3), see title CRIMINAL LAW AND PROCEDURE, Vol. IX. pp. 561, 562.

(*m*) Seal Fishery Act, 1875 (38 & 39 Vict. c. 18), s. 2; Order in Council, 28th November, 1876. In these waters "seal" means the harp or saddleback, the bladder-nosed or hooded, the ground or bearded, the floe seal or floe rat (*ibid.*, s. 6). The penalty for breach of the provisions of the Seal Fishery Act, 1875, is a fine not exceeding £500 if sued for in the High Court, or £200 in summary proceedings (*ibid.*, s. 2). The fine may be recovered by distress and sale of the ship where the offender is the owner or master (*ibid.*, s. 5).

(*n*) As to courts of summary jurisdiction, see title REGISTRATION.

(*o*) Salmon and Freshwater Fisheries Act, 1892 (55 & 56 Vict. c. 50), ss. 4, 5.

(*p*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), ss. 36, 37. The foreshore is part of the body of the county (*Embleton* v. *Brown* (1860), 3 E. & E. 234).

(*q*) 6 & 7 Vict. c. 79.

(*r*) *Ibid.*, s. 12.

lawful ways or means into the case, and a copy of the depositions etc. are to be sent to the British consular agent at the port to which the offenders' vessel belongs (*s*).

Offences against the Sea Fisheries Act, 1868 (*t*), are triable before a justice in summary manner (*u*).

Offences against the Fisheries (Oyster, Crab, and Lobster) Act, 1877 (*x*), the Sea Fisheries Act, 1883 (except when otherwise specially provided) (*y*), and the North Sea Fisheries Act, 1893 (*z*), are triable by a court of summary jurisdiction in manner provided by the Summary Jurisdiction Acts (*a*).

A sea fishing boat is to be deemed a ship within the meaning of any Act relating to offences committed on board a ship, and the court has jurisdiction over foreigners and foreign sea fishing boats within the three-mile limit (*b*).

All offences against the Salmon Fishery Acts and bye-laws made in pursuance thereof may be dealt with summarily if the complaint be made within six months of the commission of the offence (*c*).

Justices' power to authorise inspection.

1426. Besides the powers given to courts of summary jurisdiction to hear and determine alleged offences against the statutes relating to fisheries, justices of the peace have also power to authorise any conservator of a salmon or freshwater fishery district, or a water bailiff, to remain on land when there is reason to believe that certain offences may be committed, such authorised person not being thereby guilty of a trespass. The justices may also by warrant authorise any inspector, water bailiff, conservator, constable or police officer to enter premises, or to search for or seize any alleged engines or salmon or freshwater fish illegally taken that may be found on such premises (*d*).

Disqualification of justices.

1427. Justices who sit to hear and determine offences against the Fishery Acts must not be interested in any way in the proceedings (*e*).

In the case of prosecutions instituted under the Salmon Fishery

(*s*) Sea Fisheries Act, 1843 (6 & 7 Vict. c. 79), s. 13.
(*t*) 31 & 32 Vict. c. 45.
(*u*) Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), ss. 57, 60.
(*x*) 40 & 41 Vict. c. 42.
(*y*) 46 & 47 Vict. c. 22.
(*z*) 56 & 57 Vict. c. 17.
(*a*) See title MAGISTRATES.
(*b*) Fisheries (Oyster, Crab, and Lobster) Act, 1877 (40 & 41 Vict. c. 42), ss. 11, 13; Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22), ss. 16, 18; North Sea Fisheries Act, 1893 (56 & 57 Vict. c. 17), s. 7.
(*c*) Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 62; *Morris* v. *Duncan*, [1899] 1 Q. B. 4.
(*d*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 34; Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 31; Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 9; Freshwater Fisheries Act, 1884 (47 & 48 Vict. c. 11), s. 3. These powers do not apply to offences against the Fisheries (Dynamite) Act, 1877 (40 & 41 Vict. c. 65). Though a constable may have no right to search a person, yet if young of salmon be found in that person's pockets he may be convicted of an offence against the Salmon Fishery Acts (*Jones* v. *Owens* (1870), 34 J. P. 759); see, however, *Taylor* v. *Pritchard*, [1910] 2 K. B. 320. As to water bailiffs, see p. 607, *ante*.
(*e*) *R.* v. *Allen* (1864), 4 B. & S. 915.

PART VIII. Jurisdiction of Justices.

Acts a justice is not disqualified by reason of his being a conservator or a member of a board of conservators or a subscriber to any society for the protection of salmon or trout, provided the offence is not committed on his own land (*f*). In spite of this statutory provision, if the justice has been present at a meeting of the board or society at which the prosecution was authorised, he is disqualified from acting (*g*).

Bonâ fide claim of right.

1428. Apart from any statutory provision, the jurisdiction of justices to hear and determine offences against the statutes relating to fisheries and fishing will be ousted if the act complained of was done by the defendant in the exercise of a *bonâ fide* claim or assertion of right (*h*). Justices exercising summary jurisdiction in fishery cases are subject to the general rule of law that they are not to convict where a real question as to the right of property is raised between the parties. In such case their jurisdiction ceases and the question of right must be settled by a higher tribunal (*i*).

Limits of jurisdiction of justices.

It is for the justices to determine whether or not upon the evidence before them a *bonâ fide* question of title is raised (*k*), but if there is any evidence of a legal right which a judge might leave to a jury, the justices should hold their hands; and any doubtful matter is enough to stay their hands. It is only when the justices can see that the claim is not a claim which can have any legal foundation or is one which is not made *bonâ fide* that their jurisdiction is not ousted (*l*).

The justices are not to try and decide the question of title, but if they are satisfied that the defendant has set up a *bonâ fide* claim of right, it matters not that it is a right of such a kind and such a character that it would require extremely strong evidence to establish it, and that it is one which may be really very difficult to establish, or one that has no chance of being established unless it is established by much more cogent evidence than that produced before the justices (*m*). The expression "*bonâ fide* claim" means that the right claimed must be one that may be possible in law. If it is a claim to a right which cannot exist in law, or as to which there can be no legal right on the part of the defendant, then the jurisdiction is not ousted (*n*). Proof that the claimant honestly believes he has the right does not of itself oust the jurisdiction; he may be convicted,

(*f*) Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 61.

(*g*) *R.* v. *Henley*, [1892] 1 Q. B. 504; *R.* v. *Lee* (1882), 9 Q. B. D. 394; *R.* v. *Hodgson* (1864), 28 J. P. 484; *R.* v. *Burton, Ex parte Young*, [1897] 2 Q. B. 468; *R.* v. *Huggins*, [1895] 1 Q. B. 563.

(*h*) See Paley on Summary Convictions, 8th ed., pp. 157, 165.

(*i*) *R.* v. *Stimpson* (1863), 4 B. & S. 301.

(*k*) *Legg* v. *Pardoe* (1860), 9 C. B. (N. S.) 289; *Cornwell* v. *Sanders* (1862), 32 L. J. (M. C.) 6.

(*l*) *Burton* v. *Hudson*, [1909] 2 K. B. 564, 571; *Watkins* v. *Smith* (1878), 26 W. R. 692; *R.* v. *Stimpson*, *R.* v. *Peak* (1863), 8 L. T. 536.

(*m*) *Chesterfield* v. *Fountaine* (1895), [1908] 1 Ch. 243, n. (claim by freeholders of a manor to fish without stint).

(*n*) *Burton* v. *Hudson*, [1909] 2 K. B. 564; *Re Brancaster Fishery* (1875), 39 J. P. 372; *Mussett* v. *Burch* (1876), 35 L. T. 486; *Croydon Rural District Council* v. *Crowley* (1909), 100 L. T. 441; *Priest* v. *Archer* (1887), 51 J. P. 725; *Ex parte Higgins* (1843), 10 Jur. 838.

however honest his belief in the right claimed may be, if it be one unknown to the law, unless *mens rea* is a necessary ingredient to the offence (*o*).

A claim to fish as a member of the public will not oust the jurisdiction if at the *locus in quo* the water is non-tidal though navigable (*p*), or made navigable by Act of Parliament (*q*), or is a pond or lake (*r*).

In the case of fishing in tidal waters the presumption is that the public have a right to fish, but once the magistrates are satisfied that a several fishery exists over the *locus in quo*, then the public can have no right and the justices should try the case (*s*).

(*o*) *Hudson* v. *MacRae* (1863), 4 B. & S. 585. *Mens rea* is not an ingredient of an offence under the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 24; *Halse* v. *Alder* (1874), 38 J. P. 407; *Leatt* v. *Vine* (1861), 30 L. J. (M. C.) 207.

(*p*) *Pearce* v. *Scotcher* (1882), 9 Q. B. D. 162; *Smith* v. *Andrews*, [1891] 2 Ch. 678; *Blount* v. *Layard* (1888), cited [1891] 2 Ch. 681, n., C. A.

(*q*) *Hargreaves* v. *Diddams* (1875), L. R. 10 Q. B. 582.

(*r*) *Bloomfield* v. *Johnston* (1868), 8 I. R. C. L. 68, Ex. Ch.; *R.* v. *Steer* (1704), 6 Mod. Rep. 183; *O'Neill* v. *Johnston*, [1908] 1 I. R. 358.

(*s*) *Booth* v. *Brough* (1869), 33 J. P. 694; *Re Brancaster Fishery* (1875), 39 J. P. 372; *Neill* v. *Devonshire* (*Duke*) (1882), 8 App. Cas. 135; see also *R.* v. *Stimpson* (1863), 4 B. & S. 301. As to presumptions in respect of title, see p. 577, *ante*.

FIXTURES.

See AGRICULTURE; BILLS OF SALE; LANDLORD AND TENANT; MORTGAGE; REAL PROPERTY AND CHATTELS REAL.

FLAGS.

See SHIPPING AND NAVIGATION.

FLATS.

See LANDLORD AND TENANT.

FLEET.

See ROYAL FORCES.

FLEET MARRIAGES.

See EVIDENCE; HUSBAND AND WIFE.

FLOODS.

See WATERS AND WATERCOURSES.

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See ADMIRALTY; CONSTITUTIONAL LAW; SHIPPING AND NAVIGATION.

END OF VOL. XIV.

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